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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARY L. HELMS, *et al.*,

Petitioners,

v.

CECIL J. PICARD, *et al.*,

Respondents,

and

RICHARD W. RILEY, Secretary of the United States Department of Education; UNITED STATES DEPARTMENT OF EDUCATION,

Respondents,

and

SPECIAL EDUCATION SERVICES CORPORATION,

Respondent,

and

GUY MITCHELL, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Jefferson Parish (Louisiana) Public School System's ("JPPSS") contract with the sectarian Special Education Services Corporation ("SESC") to provide special education to students voluntarily enrolled in only 8 Catholic schools violates the equal treatment requirements of the Establishment Clause, while students needing special education and voluntarily enrolled in scores of other nonpublic schools are deprived of the same services being provided at their schools.

2. Whether JPPSS' special education program for students voluntarily enrolled in sectarian schools violates the Establishment Clause by fusing government with religion through the delegation of discretionary governmental power to religious bodies, resulting in impermissible government entanglement with religion, and thus conflicting with this Court's decision in *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994).

3. Whether the teaching of special education core subjects on sectarian school premises violates the Establishment Clause because (a) for the student, the program supplants the courses offered by the school and provides economic benefits to the school's religious mission; (b) the sectarian school principal is the immediate supervisor and evaluator of the special education teacher; (c) the special education teachers are considered part of the faculty and permanently assigned to teach during the full school day at a single sectarian school and generally may not be involuntarily transferred from that school; and (d) the program is devoid of the other safeguards against Establishment Clause violations articulated in *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

PARTIES TO THE PROCEEDINGS

The following were parties before the court of appeals:

Petitioners: Mary L. Helms, Amy T. Helms, Marie L. Schneider

Respondents: Cecil J. Picard, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education; Jefferson Parish School Board System, Elton LaGasse, Superintendent of the Jefferson Parish School System; Laurie E. Rolling, President and member of the Jefferson Parish School Board; school board members Libby Moran, Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Polly Thomas, Gene Katsanis, Martin Marino; Richard W. Riley, United States Secretary of Education; United States Department of Education, Special Education Services Corporation; intervenors Guy Mitchell, Jan Mitchell, Claire Friedrichs, Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton

To the best of petitioners' counsels' knowledge, the Special Education Services Corporation has no parent company or subsidiaries but is believed to be affiliated with the Archdiocese of New Orleans.

LIST OF PARTIES

The parties who seek review are all listed above as petitioners. Respondents in this appeal are the same as set forth as respondents above.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Mary L. Helms, Amy T. Helms, and Marie L. Schneider respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the court of appeals (App. 1a-67a)[1] entered on August 17, 1998, is reported at 151 F.3d 347 (5th Cir. 1998). The Opinion of the United States District for the Eastern District of Louisiana on post-judgment motions entered on January 29, 1997, is unreported and is included in the Appendix at 68a-107a. The Opinion of the United States District Court for the Eastern District of Louisiana (App. 108a-206a) entered on June 10, 1994, is reported at 856 F. Supp. 1102 (E.D. La. 1994). The Opinion: Order and Reasons of the United States District for the Eastern District Louisiana on motions for summary judgment as to Chapter 2 and the sectarian character of the schools entered March 27, 1990, is unreported and is found in the Appendix at 261a-275a.

JURISDICTION

Plaintiffs filed this action seeking to invalidate certain programs under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs invoked original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

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[1] "App. __a" refers to the Appendix herein; "PX __" refers to plaintiffs' exhibits; "Ex. S-__" refers to stipulated exhibits; "TR __ at __" refers to the trial transcript.

Appeals were lodged from a final judgment entered by the United States District Court finding that the on-site special education program as administered violates the Establishment Clause and entered judgment in favor of plaintiffs on July 25, 1994. *See* App. 279a-291a. An amended judgment was entered on January 28, 1997, App. 276a-278a, but this amended judgment did not relate to or disturb the prior judgment as to the special education issue.

In response to appeals filed by defendants, the Fifth Circuit Court of Appeals on August 17, 1998, reversed as to the special education program and entered judgment in favor of defendants declaring the special education program constitutional as applied. *See* App. 66a-67a. Some defendants timely filed Petitions for Rehearing and Suggestions for Rehearing En Banc as to other issues. Their petitions were denied on January 13, 1999. *See* App. 292a-294a.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments 1 and 14, section 1 is set forth at App. 295a. The relevant provision of the Louisiana Exceptional Children's Act, La. Rev. Stat. Ann. § 17:1941 is set forth at App. 295a-296a. The relevant State Regulations for Implementation of the Exceptional Children's Act, § 400, is set forth at App. 303a-304a.

STATEMENT OF THE CASE

Petitioners argue that the special educational services program serving students voluntarily enrolled at 8 Catholic

schools in Jefferson Parish, Louisiana, violates the Establishment Clause because (1) the arrangement is religiously discriminatory; (2) teachers are under the immediate control of sectarian authorities and paid from commingled governmental and sectarian funds; (3) it creates excessive entanglement between church and state because of the fusion of government and religious functions; (4) it is devoid of the safeguards deemed essential in *Agostini v. Felton*, 117 S. Ct. 1997 (1997); and (5) supplants, rather than supplements, core educational courses and financially benefits religious education.

A. Relevant Facts

This appeal pertains to an agreement by Jefferson Parish Public School System ("JPPSS"), a Louisiana pubic school district, and the Catholic Archdiocese of New Orleans ("archdiocese") to provide special education teachers to teach core subjects in a limited number of Catholic schools. The arrangement was borne out of negotiations between the JPPSS and the archdiocese originating with an October 5, 1982, letter from the Superintendent of Schools for JPPSS to the Superintendent of Schools for the archdiocese proposing a procedure for the placement of special education classes and teachers in nonpublic schools. PX 253 at 20-21.

Because the teachers provided by JPPSS to nonpublic schools had escalated from 4 teachers and 4 aides during the 1975-76 school year to 63 teachers and 35 aides during the 1982-83 school year, it was proposed the number of special education teachers provided at nonpublic schools be reduced. App. at 118a-119a; PX 253 at 1. The JPPSS Superintendent established a joint school district/archdiocese committee to study the problem and make recommendations.

JPPSS decided not to establish further on-site special education classes for nonpublic school students. App. 136a ¶ 99; TR 4/5 at 99-100; TR 4/6 at 98-99. Thus, in 1988-89, only 9 Catholic schools (plus Hope Haven/Madonna Manor residential facility, a special day school operated by Associated Catholic Charities, and the Chinchuba Institute for the Deaf, a nonpublic independent school) were provided with on-site special education services by JPPSS teachers. The following school year, St. Ann decided to operate its own special education program and was deleted from the JPPSS contract with SESC. App. 122a; TR 4/5 at 113, 122-23.

In deciding where to place special education teachers, JPPSS surveys all public schools as to need but has instituted a policy to provide special education only at the 8 nonpublic schools regardless of others' needs. *Id.* at 112-13; TR 4/6 at 98-100. Also, JPPSS does not intend to eliminate any of the 8 Catholic schools currently being served. TR 4/5 at 113.

1. The Individualized Education Program

In order for a student to receive special education services, an individualized education program ("IEP") is drafted by a committee composed of the special education teacher, the principal (the officially designated representative of JPPSS), and the student's parents. TR 4/4 at 56-57, 62-63; TR 4/2 at 145. The IEP assigns the curriculum; decides what instructional and other materials will be provided; decides short and long term objectives; and decides where the student will be placed. *Id.* at 58-59.

The IEP committee, which includes the sectarian school principal, also determines the regular and elective classes the student is to attend with non-exceptional students. Religion classes are listed on the IEP as elective. *Id.* at 60-63.

The Louisiana IEP Handbook (Exhibit S-13) states:

> The public school system is not required to serve voluntarily enrolled students in nonpublic schools. Parents should be informed that in choosing not to accept the available free, appropriate public education, their right and those of the students to services, due process, and procedural safeguards are limited.[2]

App 298a; TR 4/2 at 179.

However, a student voluntarily enrolled in Jefferson Parish nonpublic schools may voluntarily receive special education services provided by JPPSS at *only* the 8 aforementioned schools. TR 4/5 at 98-100.[3]

2. Sectarian Authorities Directly And Indirectly Control Special Education Teachers.

1. Special education teachers are considered part of the sectarian school staff and are directly accountable to its principal. App. 140a ¶ 123; TR 4/3 AM at 90; TR 4/4/ at

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[2]Once a student is found to be entitled to special education services, an offer is made to provide free appropriate *public* education. If the parents reject the offer, the child is automatically assigned to the program in the Catholic school if it is one of the 8 included in the JPPSS/SESC contract. App. 304a(D); TR 4/5 at 134. But this is not dual enrollment since the child remains a Catholic school student. *Id.* at 136, 138.

[3]These schools are pervasively sectarian. App. 143a ¶ 4. Also, the schools of the archdiocese give admissions preference to Catholics. TR 4/2 at 48.

20-24, 82; TR 4/5 at 75-76; TR 4/5 at 142-44; TR 4/6 at 59-61, 65-70, 74-76. And special education teachers regard these principals as their immediate supervisors. TR 4/4 at 23-24.

2. The sectarian school principal is the formal evaluator of special education teachers. App. 135a ¶¶ 92, 93; 140a ¶ 122; TR 4/3 AM at 84; TR 4/5 at 75-76, 142-44; TR 4/6 at 59-61. Under the JPPSS/SESC contract, the evaluation of the special education teacher is "to assure that the teacher is performing her job in a satisfactory manner." TR 4/5 at 144. This evaluation is given "significant weight" by JPPSS about retaining the special education teacher as an employee. *Id.*

3. The sectarian school principal monitors the special education classroom, observing the special education teacher on repeat occasions in order to rate the teacher's performance. TR 4/4 at 21; TR 4/5 at 62-64, 79; TR 4/3 AM at 84.

4. The sectarian school principal "writes up" the special education teacher for problems. TR 4/6 at 65-69.

5. The special education teacher must follow the sectarian school's policies and procedures. Ex. S-11 at 1.

6. In at least some of the sectarian school handbooks, special education is treated as an integral part of the sectarian school's curriculum. *See* PX 50 at 17, 21-22; PX 51 at unnumbered 3; PX 52 at 6; PX 56 at 13.

7. The JPPSS assigned special education teachers who teach in the 8 Catholic schools previously taught full-time at the same school to which JPPSS assigned them. Ex. S-6; TR 4/6 at 43; 4/4 at 91; TR 4/5 at 66, 79.

3. The School District Delegates Discretionary Governmental Powers.

The agreement between JPPSS and SESC delegated important discretionary governmental powers to both SESC and the principals of the participating Catholic schools. The agreement conveyed:

1. To SESC, joint authority with the school district's special education department to decide the pupil/teacher ratio (Ex. S-9 at 1).

2. To SESC, general supervisory authority over the special education program. App. 140a-141a ¶ 124; Ex. S-9 at 2.

3. To SESC's executive director, the responsibility of monitoring to ensure that evaluations and IEPs are on file. TR 4/2 at 85.

4. To the sectarian school principal, the authority to enforce and apply Jefferson Parish personnel policies including the Teacher Evaluation Program and Teacher Assisted Evaluation program and requirements imposed by the public school board for the management and supervision of special education teachers. App. 133a ¶ 80; Exs. S-9 at 3; S-12 at 2.

5. To the sectarian school principals, the responsibility of acting as a special education teacher's immediate supervisor. App. 140a ¶ 122; TR 4/6 at 60-61.

6. To the sectarian school principals, the authority to evaluate the teacher to assure that he is performing his job in a satisfactory manner through classroom observation. App. 140a ¶ 122; Ex. S-9 at 4; TR 4/3 AM at 54; TR 4/6 at 61-68; TR 4/10 at 43-44.

7. To the sectarian school principals, at least some control over the curriculum of the special education classes conducted at their schools. TR 4/3 AM at 44.

8. To the sectarian school principals, the authority to act as "the official designee of the public school system in the preparation of the IEP." TR 4/4 at 57.

9. To the IEP committee, including the sectarian school principal, the responsibility to set forth the curriculum areas and decide where the student will be placed for special education services. TR 4/4 at 58-59.

10. To the team of sectarian school teachers employed by the sectarian school, the authority to select the textbooks used in the special education program. TR 4/4 at 50-51.

4. Special Education Teachers Are Paid From Commingled Government And Sectarian Funds.

The JPPSS assigned special education teachers are paid from commingled federal, state, and sectarian funds. Ex. S-8; TR 4/3 AM at 42; TR 4/5 at 114. SESC entered into "donors agreements" with each of the 8 Catholic schools. App. 123a-124a ¶ 38; 148a ¶ 119; 142a ¶ 131. Conversely, SESC assumed full responsibility for any part of a teacher's or teacher's assistant's salary and benefits not reimbursable by the State and/or the United States. App. 306a-307a; Exs. S-7; S-9.[4]

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[4]Also, some of the aides working under the direction of JPPSS special education teachers are provided by the sectarian school. TR 4/3 AM at 19; TR 4/4 at 81-82.

5. There Is Only Limited Monitoring Of The Special Education Program And Teachers.

State monitoring occurs on a 3-year cycle with nonpublic schools being randomly selected for monitoring. App. 132a-133a ¶ 78. But this monitoring is only to review school records and to hold conferences with the principal and teachers. There is no State policy requiring employees to inspect for religious symbols in the classrooms. App. 141a ¶ 127. Even so, one special education teacher has never been monitored by the State. App. 138a ¶ 110.

The only monitoring by JPPSS consists of *program* monitoring which occurs in a three-year cycle wherein each school, public and nonpublic, is visited once every three years. TR 4/5 at 106-08. The monitoring, however, does not ensure compliance with Establishment Clause safeguards. *See* PX 256 at 188-201.

The only other JPPSS monitoring is conducted by the IEP facilitator who monitors the IEPs in each school one to three times a year.[5] But, too, this monitoring does not ensure compliance with Establishment Clause safeguards. Rather, it is "to assure that the evaluations are in order and compliant with the regulations . . . , that the pupil/teacher ratio is accurate and not in violation, that there is no geographic isolation of classrooms, that the materials [and equipment] are available for student use, . . . and that the teacher has accurate lesson plans as well as individualized daily plans."

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[5]But this monitoring is only sporadic. The IEP specialist did not visit St. Angela Merici once during the school year of the trial, and did so only once the previous year. App. 139a ¶ 112. Rather, any contact is usually by telephone. App. 139a ¶ 113.

TR 4/5 at 106-07. *See* PX 256 at 188-201.

Even with this very limited monitoring, the JPPSS only monitors the program and DOES NOT evaluate the teacher. "The formal evaluator of the teacher is the principal of the [sectarian] school." TR 4/5 at 143-44. Under the JPPSS/SESC contract, the evaluation by the sectarian school principal is "to assure that the teacher is performing her job responsibility in a satisfactory manner." *Id.* at 144. Investigating for the presence of religious symbols is not covered in the limited monitoring *ever* because there is no established policy to do so. App. 141a ¶ 125.

In carrying out her duties as executive director of SESC, Jan Jantz visits and monitors the classrooms to ensure that evaluations and IEPs are on file.[6] TR 4/2 at 85-88; *see supra* p. 5 ¶ 7. However, her simultaneous visits with the school's principal are made in her archdiocesan capacity. All auto expenses for these joint visits are paid by the archdiocese. *Id.* at 89-90. She receives no pay nor expense monies for her activities with SESC. The archdiocese even pays for her SESC stationery and copy supplies. *Id.* at 91-92.

B. The Trial Court's Decision And Judgment

The trial court held in favor of petitioners concluding that providing state-paid special education teachers to teach core secular subjects throughout the day on the premises of pervasively sectarian schools at 8 Jefferson Parish Catholic schools violated the Establishment Clause. The trial court made the following findings of fact to support this conclusion:

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[6]The executive director of SESC, Jan Jantz, also does not monitor for religious symbols. App. 141a ¶ 126.

1. The policy and procedures of the JPPSS for placement of special education teachers in nonpublic schools was negotiated by a committee comprised of staff from the Catholic Archdiocese of New Orleans and staff from the Jefferson Parish Public School System. App. 120a ¶ 28.

2. The recommendation of this committee comprised of public school and archdiocesan staff included:

(a) Capping Jefferson Parish Public School System costs at the 1982-83 expenditure level but without affecting any existing special education classes.

(b) Beginning with the 1983-84 academic year "the total local costs for any new positions or vacancies for teachers or teachers' aides [would] be borne by the Catholic schools to which these persons are assigned."

(c) The Archdiocese would be able to establish new special education classes at its schools, but "the total local costs . . . [would] be the responsibility of the individual schools." App. 121a-122a ¶ 29.

3. The committee report was approved by the JPPSS Board. App. 122a, ¶ 30.

4. A contract providing for 14 special education teachers and up to 5 teacher assistants to be assigned to 9 Catholic elementary or secondary schools and 1 school for the deaf was entered into by JPPSS and SESC for the 1989-90 school year. App. 122 ¶ 31.

5. SESC is a "religiously affiliated corporation, App. 118a ¶ 21, based upon the following:

(a) The executive director of SESC "volunteered" her time to SESC while being a paid employee in the Office of Special Education for the Archdiocese of New Orleans. App. 118a ¶ 19.

(b) Members of the SESC Board are the respective presidents of the archdiocese's school board and diocese's school board of the Roman Catholic Archdiocese of New Orleans, Roman Catholic Dioceses of Lafayette, Baton Rouge, Houma-Thebodaux, and Lake Charles, and a representative to be appointed by the Bishop of the Diocese of Alexander - Shreveport. The corporate members are appointed by the board of trustees. App. 118a ¶ 20.

6. SESC, in turn, has a donor agreement with each participating nonpublic school requiring the school to pay to SESC the "local supplement" portion of the special education teacher's salary assigned to the nonpublic schools. The combined funds contributed by the participating nonpublic schools is the difference between what the State pays for teachers' salaries and what JPPSS would have to expend in order to cover the total salary for the teachers. App. 123a-124a ¶¶ 38-39.

7. Ordinarily, a special education teacher's salary is provided by (1) money from the State minimum foundation program to the local public school district and (2) the local salary supplement paid by the local public school board. However, under this arrangement, SESC agreed to assume full responsibility for any portion of a teacher's or teacher assistant's salary and benefits not reimbursable by the State and/or federal government. App. 123a ¶ 36.

8. The JPPSS/SESC agreement stipulates that the local public school board shall not involuntarily transfer out special

education teachers assigned to nonpublic schools prior to the 1983-84 school session unless pupil-teacher ratio changes reduce teacher needs. App. 124a-125A ¶ 42. "This provision 'means that these teachers who were assigned to [participating] nonpublic school prior to the '83-'84 school year whether certified or not would remain in those settings and would not be involuntarily transferred. . . .'" App. 125a ¶ 43.

9. Twelve of the fourteen JPPSS special education teachers teaching at the nonpublic schools are there due to the agreement between JPPSS and SESC. App. 125a ¶ 45.

10. There are special education teacher vacancies in Jefferson Parish public schools. They are in the area of teachers certified in the mild-moderate category -- the same category held by the twelve school teachers grandfathered into teaching at the nonpublic schools. App. 125a ¶ 46.

11. The special education teachers teach the entire school day in the self-contained or resource classrooms in each of the 8 participating Catholic school facilities. App. 135a ¶ 94.

12. The special education teacher permanently assigned to the nonpublic school site is considered by the JPPSS to be a part of the nonpublic school faculty. App. 140 ¶ 123.

13. The sectarian school principal is the immediate supervisor and "formal evaluator" of the special education teacher assigned to that school. App. 140a ¶ 122.

14. The executive director of SESC "has 'general supervision' of the special education program provided on the premises of the nonpublic schools." Because of this agreement, the SESC executive director visits the special education classroom and monitors the evaluations and IEPs of

the special education students. App. 140a-141a ¶ 124.

15. When evaluating the special education teachers, the sectarian school principal must follow all the policies and procedures of the public school system. And it is the Catholic school principal who completes the public school teacher evaluation form for the special education teacher assigned to that school. App. 134a ¶ 91; 135a ¶ 93.

16. The principal may assign the special education teachers to nonteaching custodial duties involving oversight of student safety and behavior, such as lunch hour and bus duty. App. 134a ¶ 89.

17. The special education teacher provides grades on the nonpublic school's regular report card. App. 134a ¶ 88.

18. Mary L. Cerise was a teacher employed as a special education teacher at St. Angela Merici. About her, the trial court said:

(a) Prior to her employment as a special education teacher, she was employed for 10 years by St. Angela Merici. App. 137a ¶ 105.

(b) She considered the Catholic school principal to be her immediate supervisor who implements the program outlined in the IEP. App. 138a ¶ 109.

(c) JPPSS' IEP specialist did not visit her school during school year in which the trial was held and only once during the previous school year. Normally any contact was by phone and occurred when she had an "'academically or IEP related' question she want[ed] clarified." App. 139a ¶¶ 112, 113.

(d) No State employee ever monitored her classroom activities. App. 138a ¶ 110.

(e) She attends the sectarian school's faculty meetings monthly but has attended only one general workshop for all special education teachers. App. 139a ¶ 116.

19. JPPSS does not charge tuition for any of the special education services. However, a special education student at St. Angela Merici pays both the private school's regular tuition and "an additional $500 fee to help 'balance out the budget.'" But a special education student at St. Agnes pays only $300 in addition to the regular tuition. App. 140a ¶ 118, 119, 120.

20. Thus, the sectarian schools received a direct economic benefit by providing special education services on their premises. These schools received tuition and a special education surcharge from the special education students; yet they are not responsible for the full salaries of the JPPSS special eduction teachers. Further, if the services were not provided at the sectarian schools, the special education students would be compelled to attend public schools which provide the necessary services at no charge to the parents. Thus, the nonpublic schools would be deprived of an economic benefit -- that is, the tuition and special education surcharge received from the special education students. App. 141a ¶ 129; 142a ¶¶ 132, 133.

21. The special education director for JPPSS from 1982-87 was unaware of any policy requiring her to observe whether religious symbols were present in special education classrooms. And the State had no policy requiring its employees to inspect for religious symbols. Further, the director did not investigate for the presence of religious

symbols. App. 141a ¶¶ 125, 127.

C. The Court Of Appeals Decision

The Fifth Circuit reversed the trial court concluding *Agostini v. Felton*, 117 S. Ct. 1997 (1997), found that providing special education teachers at sectarian schools did not violate the Establishment Clause. App. 42a. The court of appeals concluded the program here more closely resembled the Title I program found constitutional in *Agostini* than the Community Education Program found unconstitutional in *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985). App. 33a; 35a-42a. The court reasoned the Jefferson Parish teachers were "full time public employees." App. 35a.

REASONS FOR GRANTING THE WRIT

I. THE SPECIAL ARRANGEMENT TO PROVIDE ON-SITE SPECIAL EDUCATION ONLY AT SELECT CATHOLIC SCHOOLS VIOLATES THIS COURT'S DECISIONS REGARDING FIRST AMENDMENT EQUAL TREATMENT REQUIREMENTS.

The Fifth Circuit erroneously concluded that since the special education program generally selected its students based on neutral secular criteria, the arrangement (which is the subject of this petition) was also neutral and nondiscriminatory. App. 41a-42a. But the court of appeals missed the point that it was the special arrangement made between JPPSS and the archdiocese and the resulting contract between JPPSS and SESC to provide on-site special education services to students voluntarily enrolled in only 8 Catholic schools that, in part, made the program unconstitutional. *See*

p. 4 *supra*; App. 296a-297a.[7]

It is only in these select schools that voluntarily enrolled nonpublic school students are now receiving, and in the future would be permitted to receive, special education services. No other sectarian school may receive on-site special education services from public school teachers.

The record also shows there were once many nonpublic schools in Jefferson Parish that provided special education services on-site at taxpayers' expense that no longer may provide this benefit due to lack of funding. Students needing special education who would otherwise attend those schools must now enroll in other schools to receive the same type of special education. TR 4/2 at 181. As part of their regular school services, several archdiocese schools employed at their own expense special education teachers during 1983-84. And one of the original 9 Catholic schools, St. Ann, subsequently hired its own special education teacher and provided services without State funding.

The court of appeals decision is fatally flawed because of its conclusion that the program complained of is neutral. But it is anything but neutral. This is an important distinction between this case and *Agostini* where *all* schools, both public and private, may request and receive on-site Title I services for students enrolled in their schools.

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[7]The 8 schools that have tax-supported on-premises special education are thus given a competitive advantage over the other nonpublic schools. St. Mary Magdalen School describes the program as if it is an integral part of its program. In its Parent-Student Handbook, it is listed under a "School Services" heading. PX 51 at unnumbered 3. St. Benilde advertises it as a "Resource Program." PX 52 at 6.

As this Court stated in *Larson v. Valente*, 456 U.S. 228, 234 (1982):

> The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.

But that is exactly what happens in Jefferson Parish. As Justice O'Connor noted in her opinion, concurring in part and concurring in the judgment, in *Board of Educ. v. Grumet*, 512 U.S. 687, 715 (1994):

> This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses -- the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion -- all speak with one voice on this point.

This exclusionary arrangement providing discriminatory treatment favoring 8 Catholic schools alone condemns the program as violative of the First Amendment. Further, this special benefit conferred on the 8 Catholic schools is the result of government, not private, decision-making. Thus, the "private choice" principle set forth in *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 488 (1986), has no application here. *See Agostini*, 117 S. Ct. at 2012. Rather, the parent's choice *follows* the contract executed between JPPSS and SESC contrary to the view of the Fifth Circuit. *See* App. 38a-39a.

II. THE SPECIAL EDUCATION PROGRAM RESULTS IN EXCESSIVE CHURCH-STATE ENTANGLEMENT THUS CONFLICTING WITH THIS COURT'S HOLDINGS IN *LARKIN* AND *GRUMET*.

The Fifth Circuit relegated its excessive entanglement analysis to one paragraph only, App. 42a, and is premised on a false concept: If a teacher is "publicly-paid," there is no risk that teacher will inculcate religion. But in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), this Court warned of "the danger that a teacher under religious control and discipline posses to the separation of the religious from the purely secular aspects of pre-college education." *See* pp. 5-6 *supra*. Even if a teacher does not teach the religious course, "[w]hat would appear to be essential to good citizenship might well border on or constitute instruction in religion." *Id.* at 619. Here we have the additional problem that special education teachers are provided no guidance and are required to enforce sectarian school rules.

The Fifth Circuit ignored the fact the arrangement between JPPSS, SESC, and the 8 Catholic schools resulted in the impermissible fusion of governmental and religious functions by delegating important discretionary governmental powers to religious bodies. *See* pp. 7-8 *supra*.

The link between church and state is further forged here by the close relationship between SESC and the various Catholic dioceses. SESC's articles defines that the respective presidents of certain State archdiocesan and diocesan school boards constitute the corporate membership. TR 4/2 at 43-44. The Board is comprised of a mix of both church and State officials, in addition to the six trustees who are the respective presidents of the archdiocesan and diocesan school boards, the SESC board includes three ex officio trustees: the president of the State senate, the speaker of the State house of representatives, and the executive secretary of the Louisiana Independent School Association. *Id.* at 46, 94-95.

Justice O'Connor, concurring in part and concurring in the

County of Allegheny v. ACLU, 492 U.S. 573, 624-25 (1988), judgment, observed that "'[e]very government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion.'" Here, sectarian authorities control those paid by public funds.

In *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982), this Court stated "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions,'" concluding that "[t]he Framers did not set up a system of government in which important discretionary governmental powers would be delegated to or shared with religious institutions." That bedrock principle was reasserted in *Board of Educ. v. Grumet*, 512 U.S. at 696-97, where this Court again held that "'the fusion of governmental and religious functions'" through the delegation of discretionary governmental powers to religious bodies results in impermissible government entanglement with religion. This fusion of governmental and religious functions provides a "significant symbolic benefit to religion." *Id.* As Justice O'Connor noted in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985), if the message conveyed is that a "particular religious belief is preferred," this "endorsement infringes the religious liberty of non-adherents."

In *Agostini,* 117 S. Ct. at 2004, Justice O'Connor noted that Title I involves delivery of services directly to students by public school teachers and staff, not teachers who are employees of religious schools. Unlike *Agostini*, here a mixture of authority over the program and teachers is shared by an organization closely affiliated with the archdiocese school system and directed by a paid employee of the archdiocese operating out of archdiocesan offices. For the most part, the special education teachers at the Catholic schools were selected originally by its principals.

These teachers are directly supervised by the sectarian school principal to whom they report and are considered part of the parochial school staff, though hired as public school teachers. They are paid by commingled funds received from federal, state, and religious entities. *See* p. 8 *supra*.

Monitoring, though lax, includes on-site visits from an employee of the archdiocese who appears at the parochial school both in her capacity as executive director of SESC, funneling sectarian funds to the school district as partial salary payment and also in her capacity as coordinator of special education for the archdiocese. TR 4/2 at 87-89. The aid provided is in the form of teachers permanently assigned to teach core education subjects on the sectarian school premises during the majority of the school day, and both teacher and student are subject to regulations promulgated by both public and sectarian authorities. There is clearly a multi-faceted fusion of church and state authority over financial, employment, and program matters which is contrary to the prior teachings of this Court.

III. THE COURT OF APPEALS DECISION REVERSING THE TRIAL COURT SO EXTENDS *AGOSTINI* AS TO ELIMINATE MOST SAFEGUARDS AGAINST ESTABLISHMENT CLAUSE VIOLATIONS.

The Fifth Circuit's decision validates an on-premises program devoid of the safeguards required by *Agostini*. Central to the court's reasoning is the contention that the special education teachers here are "conscientious state employees" who cannot be presumed to be "violating the law" with regard to religious instruction. But the State financed teachers here have, as a matter of law, too close a relationship to the parochial schools in which they teach to apply the

Agostini presumption that they will not engage in religious instruction. *Agostini,* 117 S. Ct. at 2010, 2016.

The *Agostini* decision only approved the presence of State funded special education teachers in parochial schools for programs "containing safeguards such as those present here." *Id.* at 2016. The institutional "safeguards" carefully set out in *Agostini* kept public teachers and parochial schools at arms length. These safeguards are notably absent here.

With the *Agostini* safeguards absent, the relationship between the special education teachers and the parochial schools is such that, under federal employment law, the parochial schools are "joint employers" of the teachers. This gives rise to a "conflict of functions" where a teacher is subject to competing, and sometimes inconsistent, obligations and expectations of a private, sectarian employer and a public employer. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 387 (1985). Such a circumstance violates the Establishment Clause of the First Amendment. *Id.* at 397.

The relevant safeguards contained in the Title I program described in *Agostini* are as follows:

1. In *Agostini*, 117 S. Ct. at 2004, *the special education teachers were assigned to schools without regard to the wishes of the school or the religious affiliation* of the teacher. This meant that most of the special education teachers in *Agostini* had a different religious affiliation than the school in which they served. Exactly the opposite is true in the present case. The Fifth Circuit acknowledged that many of the teachers were of the same religious affiliation as the school in which they taught. App. 36a. In fact, many of the special education teachers here, immediately prior to their being selected for that role, were employed as regular classroom teachers at the

same parochial school where they now serve. TR 4/3 PM at 28-33; TR 4/4 at 6-9; TR 4/5 at 81-82.

2. In *Agostini*, 117 S. Ct. at 2004, *the vast number of the teachers were rotated among the private schools*, spending fewer than five days a week at the same school. This helped maintain a sense and appearance of separateness between the public school teachers and the private, sectarian schools. In the present case, at least 12 of the 14 special education teachers at issue are assigned, with no possibility of involuntary transfer, to teach at the same school, week in and week out, year in and year out. Ex. S-6; TR 4/6 at 43; 4/3 at 73; 4/4 at 91; TR 4/5 at 66, 79. This helped solidify a sense that the ostensible public employee was actually a part of the private school faculty. This was further augmented by the fact that the special education teachers here attended monthly faculty meetings at the schools and were subject to the religious schools' employment policies and procedures. TR 4/3 PM at 8-9; TR 4/4 at 34, 77; TR 4/5 at 67-68; Ex. S-11 at 1. For practical purposes, the career tracks of the "public school" teachers and the parochial teachers are indistinguishable. For example, one parochial school teacher who became a "public" special education teacher at her original school was later selected to become the same Catholic school's assistant principal. TR 4/3 PM at 28, 32-33.

3. In *Agostini*, 117 S. Ct. at 2004, *teachers were supplied with written and oral instructions setting out guidelines to protect the secular purposes of the Title I program*. In the present case, no such formal guidelines are supplied to the special education teachers. TR 4/4 at 38-39; TR 4/5 at 74-75, 118; TR 4/6 at 73-74; TR 4/10 at 94, 96-97. Rather, while they must generally abide by the policies and procedures of the public school system, the special education teachers are considered part of the sectarian school faculty by the

personnel department of the public school system. TR 4/3 AM at 90; TR 4/4 at 23-24, 82; TR 4/5 at 75-76; TR 4/5 at 142-44; TR 4/6 at 59-60, 65-70, 74-76. This lack of instruction on Establishment Clause issues has led to special education teachers attending mass along with their students during the regular school day, TR 4/3 AM at 17; TR 4/4 at 37, 87-88, and ignoring religious symbols in the classroom. TR 4/4 at 72; TR 4/6 at 21, 73-74.

4. In *Agostini*, 117 S. Ct. at 2004, *the special education teachers were employees of the public school board and accountable only to their public school supervisors.* In the present case, the special education teachers are directly accountable to sectarian school principals, and regard them as their immediate supervisors. *Id.*; TR 4/4 at 23-24. Indeed, the sectarian principals' supervision and oversight of the teachers is so broad that, under federal employment principles, the sectarian schools play the role of "joint employers" of the special education teachers. *See Amarnare v. Merrill Lynch*, 611 F. Supp. 344, 347 at n.11 (S.D. N.Y. 1984) (temp agency and client company joint employers of temporary worker for purposes of Title VII); *Ryals v. Mobile County Sheriff's Dept.*, 839 F. Supp. 25, 26 (S.D. Ala. 1993) (separate entities are joint employers for purposes of Title VII when both exercise "indicia of control" over an employee.)

In the absence of a relevant statutory definition, this Court has adopted a common law test to decide if an employer/employee relationship exists. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 423 (1992), *citing Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). The most important factor in this definitional test is the right of the employer to "control the manner and means by which the product is accomplished." *Id.* The essence of this test has been given focus by a number of lower

federal court decisions which also refer to the test as the hybrid economic realities/common law control test. *See Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *E.E.O.C. v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3rd Cir. 1983); *Garrett v. Mills*, 721 F.2d 979, 982 (4th Cir. 1983); *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1019 (5th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 305 (10th Cir. 1992).

If the employer has the right to control and direct the work "as to the details by which [the] result is to be achieved, an employer/employee relationship is likely to exist." *Spirides*, 612 F.2d at 831-32. Other factors considered beyond this by federal courts include: a) whether the occupation is generally supervised; b) whether it is a skilled occupation; c) whether the worker furnishes the equipment used and the place of work; d) whether the worker is affiliated with the employer for a significant period of time; e) whether the worker is paid by time or by job; f) how the relationship is terminated, whether by one or both parties, with or without notice; g) whether leave and other benefits are acquired; and h) the intention of the parties. *Nationwide Mutual Ins.*, 503 U.S. at 323-24; *Spirides*, 613 F.2d at 832; *Field,* 906 F.2d at 1020.

Here, it is the sectarian school principals who both choose the special education teachers and assist them in creating the IEPs, or individualized educational goals and programs, for the special education students. Ex. S-6; PX 257; TR 4/6 at 57. The sectarian principal then monitors the teachers' classroom performances in carrying out the goals of the IEPs. The principals do this by repeated trips to the classroom to observe the teachers in action. TR 4/4 at 21; TR 4/5 at 62-64, 79; TR 4/3 AM at 84. The special education student evaluations and IEPs are also monitored by the executive director of the SESC, which the Fifth Circuit found to be a

"religiously affiliated" organization. App. 140a-141a ¶ 124.

It is the sectarian school principals who write up the special education teachers if there are any problems with the teachers' classroom behavior. TR 4/6 at 65-69. And it is these principals who do the regular, formal performance evaluation of these teachers to make sure that they are "performing [their] jobs in a satisfactory manner." TR 4/5 at 142-44; TR 4/6 at 59-61, 144. This evaluation is given "significant weight" in any decision about retaining the special education teacher in his or her position. *Id.*

Under the "hybrid economic realities/common law control test" outlined above, the sectarian schools, because of their supervisory management and control of the special education teachers, are joint employers of the teachers. The fact that the teachers are paid primarily by State funds does not change the analysis. *Ryals*, 839 F. Supp. at 26-27 (fact that county cuts deputy sheriff's paycheck does not make county an employer). Rather, the key focus is on who supervises and controls the teachers' day-to-day activities, which in this case is the sectarian school leadership.[8] *See* pp. 5-6 *supra*. The sectarian schools provide the work spaces and materials for the special education teachers, and the vast majority of the teachers continue to be affiliated with only one school for many years. The sectarian school pays for a portion of the teachers' salary and benefits through the mechanism of the SESC. App. 123a-124a ¶¶ 36, 38-39. These factors make the

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[8]In *Levitt v. Committee for Public Educ. and Religious Liberty*, 413 U.S. 472, 480 (1973), this Court warned of the "substantial risk" as to teachers "under the authority of religious institutions" either unconsciously or otherwise . . . incul[cating] students in the religious precepts of the sponsoring church."

sectarian schools employers of the special education teachers.

In light of the above, the court below was incorrect as a matter of law to conclude that the special education teachers are "full time public employees" not jointly employed by the parochial schools where they work. Rather, the "joint employer" analysis above shows a concurrent employment, thus giving rise to the constitutional "conflict of functions" problem described in *Grand Rapids*, 473 U.S. at 387.

In the portion of *Grand Rapids* not overturned by *Agostini*, this Court struck down state funding of the after school, secular Community Education program because the instructors taught at the sectarian school during school hours. *Id.* at 386-87. The Court held that this placed the teachers in a "conflict of functions," where their sectarian teaching functions were so close in time and proximity to their secular duties that religious attitudes and ideals could inadvertently infuse into the secular programming. *Id.* This was, and still is, considered to be an Establishment Clause violation. *Id.* at 397.

This case is similar because the special education teachers here are an integral part of the sectarian schools where they teach. In most instances, these teachers have been at their respective schools for many years. They belong to the church that operates the school. Their supervisors are the principals of the schools and are also fellow church members. The special education teachers are considered faculty at the sectarian schools and take on related responsibilities, such as attendance at faculty meetings, supervision of lunchtime and attendance at school worship programs. TR 4/4 at 34. This proximity of religious and secular roles violates the Establishment Clause as much now as it did in *Grand Rapids*.

5. In *Agostini*, 117 S. Ct. at 2005, *the special education*

teachers had an unscheduled supervisory visit at least once a month by a public employee to see that the secular nature of the program was maintained. As has been discussed at pp. 9-10 *supra*, the teachers here are visited primarily by the sectarian principals and executive director of SESC. Supervisory visits by public officials are truly rare, with the monitoring program calling for a visit once every three years. TR 4/5 at 106-08. Public school IEP specialists can visit occasionally during the year, but most of the contact they have with the teachers is over the phone and rarely, if ever, in the classroom. *Id.* But even these limited contacts are not for purposes of ensuring Establishment Clause compliance, but rather for measuring the academic progress of the program. TR 4/5 at 106-07. Accordingly, the special education teachers are virtually left to their own devices and discretion when it comes to Establishment Clause issues. Thus, religious symbols decorate the walls of at least one special education classroom, contrary to the *Agostini* safeguard that "all religious symbols were to be removed" from Title I classrooms.[9] App. 73a-74a; TR 4/4 at 72; TR 4/6 at 21, 73-74. Of course, it is impossible to know how many other violations have occurred, both symbolic and substantive, in these essentially unmonitored classes.

The above facts as a matter of law require this Court to disallow the presumption in *Agostini* that "public" school teachers on sectarian school property will refrain from religious indoctrination. This places the present case squarely under the *Grand Rapids* analysis, which prohibits State funds to be used to pay teachers who are substantially a part of the parochial school environment in which they teach.

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[9]In Title I classrooms, all religious symbols are required to be removed. *Agostini*, 117 S. Ct. at 2004.

IV. THIS SPECIAL EDUCATION PROGRAM SUPPLANTS CORE SUBJECTS AND PROVIDES ECONOMIC BENEFITS TO RELIGIOUS EDUCATION.

This Court in *Agostini v. Felton*, 117 S. Ct. at 2012, stated that the aid provided cannot "indirectly finance religious education by relieving the sectarian school of costs it otherwise would have borne in educating its students." This proscription has been violated in two ways: (1) prior to and subsequent to the installation of this program in 8 Catholic schools, other nonpublic schools had established their own special education programs; and (2) unlike Title I, the program does not *supplement* other regular classes such as math, science, and reading. Here special education includes the teaching of core subjects. Thus, the program *supplants*, rather than *supplements*, basic education required in a primary or secondary school. Since tuition is charged plus a special education surcharge for a program paid for in large part by the government, the program indirectly finances religious education. App. 142 ¶ 132.

Although the court of appeals concluded the "surcharge is merely intended to equalize the salaries of the special education teachers," App. 40a, James Campbell, principal at St. Angela Merici, testified the extra $500 "[h]elps balance out the budget." But he did not believe the surcharge was because they were in the public school program. He testified he did not know why there was a surcharge. TR 4/3 AM at 22-23. Further, the nonpublic school receives the full tuition even though core subject may have been completely supplanted by the special education teacher. This is unlike *Agostini* where Title I is only supplementary and the services are provided free of charge. 117 S. Ct. at 2003.

V. THIS CASE IS OF EXCEPTIONAL IMPORTANCE BECAUSE, BY MISCONSTRUING *AGOSTINI*, A READY VEHICLE HAS BEEN CREATED FOR IGNORING BEDROCK ESTABLISHMENT CLAUSE JURISPRUDENCE, SPAWNING NEEDLESS LITIGATION

This case is extremely important because it represents an on-premises program absent the safeguards which this Court considered essential in *Agostini*. It is representative of a program totally devoid of Establishment Clause concerns.

In her *Agostini* dissent, Justice Ginsburg correctly saw this case as the appropriate case for review. *Agostini*, 117 S. Ct. at 2028. Absent this Court's prompt reversal of the Fifth Circuit's opinion, each school district in the country will be targeted for similar programs *without Agostini* safeguards. Then, the floodgates of litigation will open. This case has the necessary record to draw the appropriate parameters for on-premises sectarian school arrangements. Failure to promptly address the issue will lead to uncertainty in all the nation's school districts and unnecessary litigation.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this petition be granted and a writ of certiorari issue to review the Judgment and Opinion of the Fifth Circuit Court of Appeals.

Dated: April 13, 1999 Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 97-30231

MARY L. HELMS, individually and as next friend of Amy T. Helms; AMY T. HELMS, a minor; MARIE L. SCHNEIDER,
Plaintiffs - Appellants – Cross Appellees - Appellees,

v.

CECIL J. PICARD, Louisiana Superintendent of Public Education; KENNETH DUNCAN, Louisiana State Treasurer; LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; JEFFERSON PARISH SCHOOL BOARD SYSTEM; ELTON LAGASSE, Superintendent of the Jefferson Parish School System; LAURIE E. ROLLING, President and member of the Jefferson Parish School Board; LIBBY MORAN, Vice President and member of the Jefferson Parish School Board; ROBERT WOLFE, member of the Jefferson Parish School Board; BARRY BORDELON, member of the Jefferson Parish School Board; O.H. GUIDRY, member of the Jefferson Parish School Board; CEDRIC FLOYD, member of the Jefferson Parish School Board; POLLY THOMAS, member of the Jefferson Parish School Board; GENE KATSANIS,

member of the Jefferson Parish School Board;
MARTIN MARINO, member of the Jefferson
Parish School Board,
Defendants - Appellees – Cross Appellants,

RICHARD W. RILEY, Secretary of the
United States Department of Education; UNITED
STATES DEPARTMENT OF EDUCATION,
Defendants - Appellees,

SPECIAL EDUCATION SERVICES
CORPORATION,
Defendant - Appellant,

GUY MITCHELL; JAN MITCHELL;
EUGENE CERISE; KATHY CERISE,
Intervenor Defendants - Appellees - Cross Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.

August 17, 1998.

COUNSEL: For MARY L HELMS, individually and as next friend of Amy T Helms, AMY T HELMS, a minor, MARIE L SCHNEIDER, Plaintiffs - Appellants-Cross-Appellants: Lee Fox Boothby, Boothby & Yingst, Washington, DC.

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for THE AMERICAN CIVIL LIBERTIES UNION, ANTI-DEFAMATION LEAGUE, Amicus Curiae: Marjorie Ruth Esman, New Orleans, LA. Kenneth M Dreifach, Morrison & Foerster, New York, NY.

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For NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, Amicus Curiae: Marhsall Beil, Catherine A Rogers.

JUDGES: Before DUHE, BENAVIDES and STEWART, Circuit Judges.

OPINION: JOHN M. DUHE, JR., Circuit Judge:

I.

This case requires us to find our way in the vast, perplexing desert of Establishment Clause jurisprudence. Plaintiffs, as taxpayers, sued Defendant Jefferson Parish School Board et al., claiming that three state and one federal school aid programs were unconstitutional as applied in Jefferson Parish, Louisiana.[1] The District Court initially granted Plaintiffs' motion for summary judgment on some issues. The court then conducted a bench trial on the remaining issues and rendered judgment. When the case was reassigned due to the District Judge's retirement, the new judge reversed some the court's earlier rulings. All told, the parties spent some thirteen years in district court before reaching this Court. During that time the sand dunes have shifted.

II.

Plaintiffs first challenge Louisiana's special education program, codified at LA.REV.STAT.ANN. § 17:1941-1956 (West 1982 & West Supp. 1998), as administered in Jefferson Parish, under the Establishment Clause. After a bench trial, the district court ruled that the special education program was unconstitutional as applied, because it had the impermissible effect of advancing religion and because the monitoring necessary to prevent such an effect would result in excessive entanglement between church and state. See *Helms v. Cody, 856 F. Supp. 1102, 1121 (E.D.La. 1994)*("Helms").

A.

[1] The challenged aid programs and the procedural history of the case are more fully developed infra.

"It is and shall be the duty of state, city and parish public school systems of the state of Louisiana to provide an appropriate, free, publicly supported education to every exceptional child who is a resident therein." LA.REV.STAT.ANN. § 17:1941 ("special education statute").[2] Louisiana law defines "special education" as "any program of instruction within the preschool, elementary, and secondary school structures of the state, specifically designed to provide for different learning styles of exceptional children." LA.REV.STAT.ANN. § 17:1943(4)(West Supp. 1998). Special education programsare administered by the State Department of Education ("the Department") at the state level, and by parish or city school boards at the parish or city levels; at those lower levels, the Department provides "only general supervision and monitoring." LA.REV.STAT.ANN. § 17:1944(A)(1)(West Supp. 1998).[3]

The District Court found that state funds for special education programs are allocated to the Jefferson Parish Public School System ("JPPSS") "based on the number of

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[2] An "exceptional child" is one who is mentally disabled, gifted and talented, hard of hearing, deaf, speech impaired, severe language disordered, visually impaired, emotionally disturbed, orthopedically impaired, hospital/homebound, other health impaired, learning disabled, which includes attention deficit disordered and dyslexia, traumatic brain injured, or autistic, and as a result may require special education or services.

LA.REV.STAT.ANN. § 17:1943(2)(West Supp. 1998). We will note any provisions of the special education statute that have been amended since the time of trial and whether those amendments have any bearing on the questions before us.

[3] Additionally, the office of special education services within the Department provides "general supervision and monitoring of all education programs for exceptional children conducted within the state." LA.REV.STAT.ANN. § 17:1944(A)(2)(West Supp. 1998).

exceptional children served by employees of the local school board, consistent with state-required pupil/teacher ratios for the provision of services to students with particular exceptionalities." *Helms, 856 F. Supp. at 1110.* The court also found that "the public school system receives federal monies based on the 'child count' of special education students enrolled at both public and nonpublic schools." Id.

The Department or city/parish school boards are authorized to "enter into a purchase of services agreement with any other public or nonpublic school, agency or institution to provide free appropriate education to exceptional children in need of special education and related services...." LA.REV.STAT.ANN. § 17:1949-50 (West 1982). Pursuant to that authority, the Jefferson Parish School Board ("JPSB") contracted with the Special Education Services Corporation ("SESC") to provide special education services by public school teachers at private schools operated under the authority of the Archdiocese of New Orleans.[4] The District Court found that at the time of trial the sole employee of SESC (its executive director Jan Janz) was also a paid employee of the Office of Special Education for the Archdiocese of New Orleans; additionally, the members of the SESC were the respective Presidents of the Archdiocesan School Board and Diocesan School Board of the Roman Catholic Archdiocese of New Orleans, and the Roman Catholic Diocese of Lafayette, Baton Rouge, Houma-Thibodeaux, and Lake Charles, and a representative to be

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[4] SESC was established as a Louisiana nonprofit corporation in 1981. It was organized for the purpose of "assisting students who are having academic and behavior problems to cope in the school environment." Although SESC was originally funded with $1.65 million by the 1982 Legislature, the District Court found that since at least 1987, SESC has not received any funds from the State of Louisiana or any other governmental body. See *Helms, 856 F. Supp. at 1108.*

appointed by the Bishop of the Diocese of Alexandria-Shreveport, respectively.

Helms, 856 F. Supp. at 1108. The court thus concluded that SESC was a "religiously-affiliated corporation." Id.

The availability of special education services on the premises of nonpublic schools in Jefferson Parish caused a "dramatic escalation of requests for special-education teachers and aides by the approved nonpublic schools...." *Helms, 856 F. Supp. at 1108.* Wary that such a trend might funnel off too many students and teachers to private schools, in 1982 the JPSB formed a committee comprised of its staff and staff from the Archdiocese of New Orleans to study the problem. The committee issued a report recommending, inter alia, (1) that state funding for teachers and aides working in nonpublic schools be capped at its 1982-83 levels (excluding teachers covered under the contractual agreement for 1982-83 with SESC); (2) that, beginning with the 1983-84 academic year, "the total local costs for any new positions or vacancies for teachers or teacher aides will be borne by the Catholic schools to which these persons are assigned"; and (3) that the Archdiocese would be able to establish new special education classes at its schools, but that "the total local costs ... [would] be the responsibility of the individual schools." *Id. at 1109.* The JPSB approved the report.

The JPSB/SESC contract for the 1989-90 school year provided that the JPSB would hire up to 14 special education teachers and up to 5 teacher assistants. These teachers and assistants were assigned to Chinchuba Institute for the Deaf and eight parochial schools.[5] Under the contract, the

[5] The eight parochial schools were Immaculate Conception High School, Archbishop Rummel High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St.

classrooms were to be provided by SESC at no cost to the JPSB. The special education programs conducted in those classrooms would be supervised by both the JPSB and the administrator of SESC.

Pursuant to the contract, SESC billed the JPSB for the cost of the special education teachers and teacher assistants provided to the nine nonpublic schools. For the fiscal year 1989-90, that cost was estimated to be approximately $149,583.00. The salary of a special education teacher, one facet of those costs, consists of (1) money from the "minimum foundation" program (i.e., money that comes to Jefferson Parish from the State); and (2) the local salary supplement. In the public schools, the JPSB pays the local salary supplement. By contrast, in the nonpublic schools the SESC agreed to pay the supplement. Since 1987, SESC has been funded by contributions from the participating nonpublic schools. The parents of special education students attending these nonpublic schools pay a supplemental fee to SESC, in addition to tuition they would normally pay. See *Helms, 856 F. Supp. at 1117.*

Jefferson Parish special education teachers in both public and nonpublic schools are subject to the same Collective Bargaining Agreement. A clause in the 1989-90 agreement states that "positions in special education classes which are provided in nonpublic schools and are a duplication of services provided by the Jefferson Parish Public School System shall be filled only after all special education positions in the Jefferson Parish Public School System have been filled by certified special education teachers." See *Helms, 856 F. Supp. at 1110* (emphasis added). Notably, however, an exception to that clause states that "the Board

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Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen Elementary School.

shall not involuntarily transfer special education teachers assigned to nonpublic schools prior to the 1983-84 school session unless pupil-teacher ratio changes reduce teacher needs." *Id. at 1110-11.* The District Court found that this exception functions as a "compromise agreement involving public school teachers providing special education services at nonpublic schools." *Id. at 1111* (internal quotes omitted). Twelve of the fourteen special education teachers currently employed by the Jefferson Parish Public School System and providing services at nonpublic schools are there by reason of the exception in the Collective Bargaining Agreement ("the grandfather provision"). Id.

Pursuant to State regulations, the JPSB and SESC entered into an "interagency agreement," to be effective for one year from July 1, 1989, the stated purpose of which was to "formalize the cooperation and to identify the responsibilities" of the two entities regarding the special education program. See *Helms, 856 F. Supp. at 1113.* The interagency agreement does not specifically provide for monitoring to determine whether the special education teacher engages in either religious discussion or conduct. The contract only provides that the principal of the nonpublic school "will ensure that the policies and procedures of the [JPSB] will be followed in all areas of cooperative effort." Id.[6] The State, however, conducts inspections of randomly selected special education programs once every three years; these inspections include a thorough review of students'

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[6] Nonpublic school principals are also contractually bound to "enforce, apply, and follow all [JPSB] personnel policies and procedures, including but not limited to the Collective Bargaining Agreement, the Teacher Evaluation Program, and the Teacher Assistant Evaluation Program, in the 'management and supervision of the teachers' employed by the JPPSS." *Helms, 856 F. Supp. at 1114.*

school records and interviews with teachers and principals. Id. at 1114.

The teaching responsibilities of each JPPSS special education teacher are described in the Individualized Education Program ("IEP") of each of the teacher's students. An IEP describes each child's entire special education curriculum. State regulations mandate that "the responsibility for the development of each initial IEP rests with the [public] school system's special education supervisor." *Helms, 856 F. Supp. at 1114.* Religious instruction is not described in the IEP, nor do church or religious officials have any authority whatsoever over the content of the IEP. Id. Moreover, special education teachers must and do teach only what is outlined in the IEP. Id.

The District Court specifically found that: "the JPPSS special education teachers at nonpublic schools do not teach religion" Id.; "the special education classrooms are used only for special education instruction" Id.; and that "JPPSS special education teachers at the eight Catholic schools are not required to attend any religious services." Id.

Special education teachers teach in self-contained or resource classrooms within each Catholic school's facility. JPPSS requires all special education classrooms to be "located in the center of the school" to make it easier for students to get to their classroom. To that end, most classrooms are located in the main school building or on the main school campus.[7] No sign or other special designation indicates that the special education classroom or area used is a public school classroom or area. See *Helms, 856 F. Supp. at 1115.*

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[7] The one noted exception is at St. Christopher's Elementary School, where the special education classroom is located in a portable unit.

Nonpublic school principals may assign JPPSS special education teachers non-teaching custodial duties involving oversight of student safety and behavior -- such as lunch duty or bus duty -only in a manner consistent with the Collective Bargaining Agreement. Pursuant to that agreement, the special education teachers may also be required to attend faculty meetings no more frequently than once per month, for one hour. See *id. at 1114.*

The JPSB/SESC contract states that "teacher evaluation in the nonpublic schools falls under the auspices of the [JPPSS]; therefore, the nonpublic schools must follow all policies and procedures of the [JPPSS] governing teacher evaluation." The contract also stipulates that in the nonpublic schools, principals and special education teachers shall participate in evaluation and special education policies and procedures. See *id. at 1115.* The principal of the nonpublic school is the "supervisor and 'formal evaluator' of the special education teachers in that school." See *id. at 1117.* The record indicates that the principal, through actual classroom observation of the special education teachers and through interviews, performs limited evaluations of the teachers' "teaching abilities" and "classroom management skills." The record also indicates the principal's supervisory role is strictly circumscribed by JPPSS. There is no evidence demonstrating that the principals have supervisory authority over the content of the special education program.

The District Court made the following findings regarding Mary L. Cerise, a JPPSS special education teacher at St. Angela Merici. Prior to her employment as a special education teacher by JPPSS, Cerise was employed by St. Angela Merici for approximately ten years as an elementary education teacher. Now, however, she informs her students that she is a JPPSS employee; parents become aware of her employment when they sign the child's IEP. In testifying

about her contacts with the principal at St. Angela Merici, Cerise indicated that "during the day he often walks in and out of the classrooms." Cerise also testified that the principal was her immediate supervisor in that "his position is to see that [she] implements the program as outlined on the [IEP] and that [she is] carrying out the instructional objectives and trying to meet the needs of each child that is in [her] care." See *Helms, 856 F. Supp. at 1116.*

Prior to Cerise's tenure, an employee of JPPSS would regularly monitor Cerise's files and classroom activities at the school. Since her tenure, however, no state employee has monitored her classroom; instead, she writes down everything she does in the IEP, which is sent to an "IEP specialist" and then returned to her with accompanying commentary. The IEP specialist, Barbara Cavallino, a JPPSS employee, did not visit St. Angela Merici during the 1989-90 school year, but did visit once during the previous year. Cerise's contact with the IEP specialist is normally by telephone and occurs whenever she has an "academically or IEP-related" question that she wants clarified. See id.

In addition to the student report cards issued by the parochial school, Cerise must complete a progress report which is required by the JPPSS for every special education student. Cerise attends faculty meetings at St. Angela Merici on a monthly basis. She attended one general workshop for all special education teachers sponsored by the JPPSS at the beginning of the 1989-90 school year. See id.

Jan Janz, the sole employee and executive director of SESC, has "general supervision" of the special education program provided on nonpublic school premises by the JPSB/SESC contract. She visits the special education classrooms and monitors the evaluations and the IEPs of the special education students that are on file. Janz testified that

she did not specifically monitor for religious symbols in the special education classrooms, but that if she observed a religious symbol in the classrooms, she "would ask that they remove it." Barbara Turner Windhorst, the director of special education from June of 1982 to January of 1987, was not aware of any JPPSS policy which required the director of special education to observe whether religious symbols were present in the special education classrooms. She did not investigate for the presence of religious symbols, nor did she recall whether any religious symbols were present in the special education classrooms. The State of Louisiana has no policy that requires its employees to inspect the special education classrooms for such symbols. See *id. at 1117.*

JacLynn Welsch, a volunteer teacher's assistant to Jean Douglass (a JPPSS special education teacher also at St. Angela Merici), testified that Douglass taught special education classes to upper grades in a partially partitioned classroom. The classroom also serves as the special education room for another teacher. Welsch testified that there is a crucifix in the room. See *id. at 1116.*

The District Court ended its fact-findings with the following conclusions:

> (1) "Special education teachers employed by the [JPSB] provide special education services on the premises of parochial schools";
>
> (2) "There was no financial incentive for the parents of special education students to choose a nonpublic school. In fact it is undisputed that the students would have received special education at no cost in the public schools. Instead, the parents of special education students elected to pay an extra charge, in addition to

the regular tuition, in order for their children to attend a parochial school";

(3) "The State of Louisiana is presently disbursing funds to Jefferson Parish to provide special education services to all qualified children in Jefferson Parish, whether they attend public or nonpublic schools";

(4) "No state, federal, or Jefferson Parish funds are paid directly to SESC or to the parochial schools. Rather, SESC contributes monies to the [JPSB] to help pay for the salaries of the JPPSS special education teachers located at the parochial schools. SESC receives its monies from the individual schools providing the special education services";

(5) "The parochial schools have received a direct economic benefit by furnishing special education services on their premises. The parochial schools receive tuition and a special education surcharge from the special education students, yet they are not responsible for the full salaries of the JPPSS special education teachers. The JPPSS special education teachers are paid by the [JPSB] with funds primarily obtained from the State of Louisiana and supplemented by the parochial schools through SESC";

(6) "If the special education services were not provided at the nonpublic schools, those special education students would be compelled to attend public schools which provide the necessary services at no charge to the parents. Thus, the nonpublic schools would be deprived of an economic benefit, that is, the tuition and the special education surcharge received from the special education students."

Helms, 856 F. Supp. at 1117-18.

B.

The District Court began its conclusions of law by holding that the eight Catholic schools at issue here are "pervasively sectarian." *Helms, 856 F. Supp. at 1118*, quoting *Bowen v. Kendrick, 487 U.S. 589, 610, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988)*. Regarding the familiar three-part test of *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)*, the court observed that "even though Lemon has not been overruled, its continuing vitality appears to be in question." *Helms, 856 F. Supp. at 1118*, citing *Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S. Ct. 2141, 2148 n.7, 124 L. Ed. 2d 352 (1993)*.

Thus, the court relied primarily on the analysis used in the Supreme Court's (then) most-recent Establishment Clause case, *Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 125 L. Ed. 2d 1, 113 S. Ct. 2462 (1993)*. Zobrest held that the Establishment Clause does not bar a school district from furnishing an exceptional child with a sign-language interpreter at a parochial school "in order to facilitate his education." *Zobrest, 509 U.S. at 14*. The district court followed the Zobrest analysis and asked whether the Louisiana special education program, as applied in Jefferson Parish, more closely resembled the school aid programs found constitutional in *Mueller v. Allen, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983)*, and *Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986)*, or instead more closely resembled the school aid programs struck down in *Meek v. Pittenger, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975)*, and *School Dist. of Grand Rapids v. Ball, 473 U.S.*

373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985). See *Helms, 856 F. Supp. at 1118-19,* citing *Zobrest, 509 U.S. at 7-14.*

Ultimately, the court found that "the situation in the instant case more closely resembles Meek and Ball, rather than Mueller and Witters." *Helms, 856 F. Supp. at 1120-21.* In the court's view, the provision of special education services on parochial school premises, where the teachers are paid by a combination of State and SESC funds, amounted to "assistance ... given directly to the schools themselves, and not indirectly through the parents or students." Id. Quoting from Meek, the court thus concluded that the JPPSS special education teachers were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Id. at 1121,* quoting *Meek, 421 U.S. at 371.* Further, the court found that the continuing surveillance necessary to insure that teachers would not inculcate religion "could result in administrative entanglement between the parochial schools and the State and Jefferson Parish." *Helms, 856 F. Supp. at 1121,* citing *Meek, 421 U.S. at 372.* Consequently, the court felt itself "compelled to find that the special education statute, LA.REV.STAT.ANN. §§ 17:1941-1956, which allows state-paid teachers to teach on the premises of pervasively sectarian institutions, violates the Establishment Clause as applied." *Helms, 856 F. Supp. at 1121.*

C.

1.

When we view the deceptively simple words of the Establishment Clause[8] through the prism of the Supreme Court cases interpreting them, the view is not crystal clear. Indeed, when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," as a Circuit Court bound by the High Court's commandments we must proceed in fear and trembling. See *Lemon, 403 U.S. at 612*, quoted with approval in *Mueller, 463 U.S. at 393*, and *Committee for Public Education v. Nyquist, 413 U.S. 756, 761, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973)*.

That said, we begin by observing that the Supreme Court's most recent sermon in this area, *Agostini v. Felton, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997)*, which was not available to the district court, must control the outcome here, as it presents a factual situation closely analogous to our own. See discussion infra. Agostini overruled a portion of Ball, supra, a case on which the District Court relied. See *Agostini, 117 S. Ct. at 2016*, overruling *Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985)*, and overruling in part *Ball, 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985)*. The crucial question before us is whether Agostini mandates a different result than that reached by the district court. We hold that it does.

Agostini considered the constitutionality of Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, *20 U.S.C. § 6301* et seq. ("Title I"). Title I channels federal funds, through the States, to "Local Educational Agencies" ("LEAs"), which in turn spend the funds to provide remedial education, guidance and job counseling to eligible students. See *Agostini, 117 S. Ct. at*

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[8] "Congress shall make no law respecting an establishment of religion...." U.S. CONST. amend. I.

2003. An eligible student is one who resides within the attendance boundaries of a school located in a low-income area and who is failing, or is at risk of failing, the State's student performance standards. Id. at 2003-04. Title I requires that funds be made available equitably to all eligible children, whether they attend public or private schools. Id. at 2004.

When an LEA provides Title I services to children attending private schools, those services are subject to heightened constraints. For example, Title I services may be provided only to eligible private school students and, unlike at public schools, those services therefore cannot be provided on a "school-wide" basis. See id. Additionally, the LEA must retain complete control over Title I funds and must retain title to all materials used in conjunction with Title I services. Id. The LEA also must provide those services through public employees or other persons independent of the private school and any religious institution. Id. Importantly, the Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school. Id.

The LEA in Agostini, the Board of Education of the City of New York, struggled for over a decade attempting to provide Title I services to private school students within its jurisdiction. See *Agostini, 117 S. Ct. at 2004.* After unsuccessful experiments involving the off-campus provision of services, the Board of Education implemented the plan that invoked the wrath of the Agostini plaintiffs:

> That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private

> schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. [A] large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school.

Agostini, 117 S. Ct. at 2004 (citations omitted). As an additional safeguard, public employees providing Title I services on private school premises "would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised." Id. Consultations with a student's regular classroom teacher were limited to "mutual professional concerns regarding the student's education." Id. at 2005. Finally, "a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month." Id.

In 1987 six federal taxpayers sued claiming that the Board's Title I program violated the Establishment Clause. At the conclusion of the dispute's first lap through the Federal court system, the Supreme Court affirmed the decision of the Second Circuit, holding that the program was unconstitutional because it "necessitated an 'excessive entanglement of church and state in the administration of [Title I] benefits.'" *Agostini, 117 S. Ct. at 2005,* quoting *Aguilar, 473 U.S. at 414.* Consequently, on remand the District Court permanently enjoined the Board of Education from allowing State-funded "public school teachers and guidance counselors to provide teaching services on the premises of sectarian schools within New York City." *Agostini, 117 S. Ct. at 2005.*

In 1995, the Board, together with a group of parents of parochial school children entitled to Title I services, moved the District Court under Federal Rule of Civil Procedure 60(b), seeking relief from the permanent injunction on the grounds that the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Id. at 2006, quoting *Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992).* Both the District Court and the Second Circuit denied relief, but the Supreme Court reversed and vacated the injunction. *Agostini, 117 S. Ct. at 2019.*

The central question before the Court in Agostini was "whether Aguilar [had] been eroded by [the Court's] subsequent Establishment Clause cases." Id. at 2008. To answer it, the Court first had to discuss the underpinnings of Aguilar and its companion case, Ball:

> Distilled to essentials, the Court's conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and, (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in Aguilar there was a fourth assumption: that New York City's Title I program necessitated an excessive entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

Agostini, 117 S. Ct. at 2010. The Court then proceeded to demonstrate how its intervening decisions had "undermined the assumptions upon which Ball and Aguilar relied." Id.

While the Court reaffirmed the bedrock principle that "government inculcation of religious beliefs has the impermissible effect of advancing religion," the Court found that cases subsequent to Aguilar had "modified in two significant respects the approach [it] uses to assess indoctrination." *Agostini, 117 S. Ct. at 2010.* The first sea-change the Court noted in its indoctrination analysis was that it had:

> abandoned the presumption erected in Meek and Ball that the placement of public school employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.

Id., citing *Zobrest, 509 U.S. at 13.* No longer, then, would a public employee on sectarian school property "be presumed to inculcate religion in the students," without evidence to the contrary. *Agostini, 117 S. Ct. at 2011;* see also id. at 2012 ("Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students."). Nor would the mere presence of a public employee on the premises of a religious school "create[] an impermissible 'symbolic link' between government and religion." Id. at 2011. The Court thus demolished with one swift stroke the first two assumptions upon which Ball had stood. See id. at 2010.

The second "significant" alteration the Court noted was that it had "departed from the rule relied on in Ball that all government aid that directly aids the educational function of

religious schools is invalid." Id. at 2011 (emphasis added). The Court, however, was somewhat cryptic about how one might distinguish between valid and invalid government aid that "directly aids the religious function of religious schools." From the Court's reliance on Zobrest, supra, and also on *Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986)*, however, we can glean the kinds of requirements the Court might demand of such aid. First, it was crucial in the Court's view that any aid be neutral -- that is, that any aid be "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefited." *Agostini, 117 S. Ct. at 2011*, quoting *Witters, 474 U.S. at 487*. Second, the Court required that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of individuals." *Agostini, 117 S. Ct. at 2011-12*, quoting *Witters, 474 U.S. at 487*. Relative to the second requirement, the Court noted that an aid program's eligibility criteria may ensure that the aid flows to sectarian institutions only as a "result of the private decision of individual parents" (i.e., if the aid is given based on factors unrelated to religion, the fact that some aid is channeled to religious schools is a function of the parents' decision to send their children to such schools and therefore "[can] not be attributed to state decisionmaking."). *Agostini, 117 S. Ct. at 2012*, citing *Zobrest, 509 U.S. at 10*. Finally, the aid cannot "indirectly finance religious education by 'relieving the sectarian school of costs [it] otherwise would have borne in educating [its] students." *Agostini, 117 S. Ct. at 2012*, citing *Zobrest, 509 U.S. at 12*. [9]

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[9] The Court also observed that whether the aid is provided to one student, as it was in Zobrest, or to several students at once, as it was in Agostini, "is not constitutionally significant." *Agostini, 117 S. Ct. at 2013*.

The criteria by which an aid program identifies its beneficiaries may, in the Court's view, advance religion in another way: "the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini, 117 S. Ct. at 2014*, citing *Witters, 474 U.S. at 488*, and *Zobrest, 509 U.S. at 10*. The Court provided a test for determining whether aid criteria create such an incentive:

> This incentive is not present, however, when the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

Agostini, 117 S. Ct. at 2014, citing *Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981)*. When assessing whether an aid program has the impermissible effect of advancing religion, then, the criteria by which that aid is allocated are relevant in two distinct ways: whether any use of the aid to indoctrinate religion can be attributed to the state, and, whether the criteria themselves create a financial incentive to undertake religious indoctrination. See *Agostini, 117 S. Ct. at 2014*.

The Court in Agostini expressly treated the "entanglement" prong (often regarded as the third prong -- see, e.g., *Mueller, 463 U.S. at 394)* of the Lemon test as "an aspect of the inquiry into a statute's effect." *Agostini, 117 S. Ct. at 2015*, citing *Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 674, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970)*. The Court did so observing that, regardless how it had characterized the "entanglement" inquiry in prior cases, "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'" *Agostini, 117 S. Ct. at*

2015. Those factors include (1) "the character and purposes of the institutions benefited," (2) "the nature of the aid that the State provides," and, (3) "the resulting relationship between the government and religious authority." Id.

The Court emphasized that not every entanglement between government and religion offends the Constitution:

> Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.

Agostini, 117 S. Ct. at 2015 (citations omitted). The Aguilar Court found that the Board's Title I program fostered excessive entanglement for three reasons: (1) "the program would require pervasive monitoring by public employees to ensure that Title I employees did not inculcate religion"; (2) "the program required administrative cooperation between the Board and parochial schools"; and, (3) "the program might increase the dangers of political divisiveness." Id., citing *Aguilar, 473 U.S. at 413-14* (internal quotes omitted). The Agostini Court began, however, by observing that the last two grounds cannot, in and of themselves, create an excessive entanglement, since "they are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus." *Agostini, 117 S. Ct. at 2015.*

More importantly, the Court remarked that, since it had abandoned the assumption that public employees on sectarian school premises will inevitably inculcate religion,

> we must also discard the assumption that pervasive monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

Agostini, 117 S. Ct. at 2016, referring to *Bowen, 487 U.S. at 615-17* (emphasis added). Thus, the Court will now require evidence demonstrating the insufficiency of a particular monitoring system before it will conclude that public teachers on parochial school grounds are impermissibly inculcating religion.

The Court concluded with the following language:

> To summarize, New York City's Title I program does not run afoul of any of the three criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.

Agostini, 117 S. Ct. at 2016. The Court then stated its holding:

> We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The

> same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law.

Id (emphasis added).

2.

For our purposes, Agostini is as important for what it did not hold as for what it did. As the emphasized language at the end of the last section shows, Agostini only overruled that part of Ball dealing with the Shared Time program. See also *Agostini, 117 S. Ct. at 2016* ("...overruling Aguilar and those portions of Ball inconsistent with our more recent decisions."). Agostini explicitly left intact that part of Ball which struck down the Community Education program. See id.; see also *Agostini, 117 S. Ct. at 2019 n.1* (Souter, J., dissenting). We believe that contrasting the two programs in Ball will further illuminate the meaning of Agostini, for while the Shared Time program is constitutional under Agostini, presumably the Community Education program is not.

The Shared Time program offered classes during the regular schooldays that were "supplementary" to State-required core curriculum courses.[10] See *Ball, 473 U.S. at 375.* By contrast, the Community Education program offered courses to children and adults that commenced after the

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[10] For example, the Shared Time program offers courses such as "remedial" and "enrichment" mathematics, reading, art, music, and physical education. Id.

regular schooldays. *Id. at 376.*[11] Courses offered included Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation. *Id. at 376-77.* The Court did not indicate that the Community Education courses were intended to be "supplementary" to core curriculum subjects. There was evidence that both Shared Time and Community Education courses taught at nonpublic schools were also available, perhaps in a different format, in public schools. Id.

The Ball Court noted that "both programs [were] administered similarly." *Id. at 377.* For example, nonpublic school administrators decided which courses to offer, based on a list of courses provided by the Director of the program, a public school employee. Id. Nonpublic administrators also decided which classrooms would be used for the programs, subject to inspection of the facilities by the same Director. Id. The public school system "leased" the classrooms from the nonpublic schools for a nominal weekly charge. Id. The leased classrooms had to be free of any religious symbols, although religious symbols "[could] be present in the adjoining hallways, corridors, and other facilities used in connection with the program." *Id. at 378.* The program teacher was required to post a sign outside the classroom stating that it was a "public school classroom." Id.

The most important difference between the two programs was the status of their teachers. See *id. at 387.* The Shared Time teachers were "full-time employees of the public schools." *Id. at 376.* In stark contrast,

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[11] The appeal in Ball "involved only Shared Time classes at the elementary level, Community Education classes at the elementary level, and the remedial mathematics Shared Time Program at the secondary level." *Id. at 376 n.1.*

> Community Education teachers are part-time public school employees. (...) Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, virtually every Community education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.

Ball, 473 U.S. at 377 (emphasis added). While it is true that approximately 10% of the Shared Time teachers "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed," no Shared Time teachers were concurrent employees of both the nonpublic schools and the public school system. See *id. at 376.*

Although the Ball majority invalidated both programs, its discussion of the Community Education program focused on the dual roles of that program's teachers:

> These [Community Education] instructors, many of whom no doubt teach in the religious school precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular schooldays to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the [Community Education] program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schooldays is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance

> religious purposes during the "official" schooldays. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content.

Ball, 473 U.S. at 386-87. Given the "conflict of functions inherent in the situation," the Court found "a substantial risk that, overtly or subtly, the religious message [the teachers] are expected to convey during the regular schooldays will infuse the supposedly secular classes they teach after school." *Id. at 387,* in part quoting *Lemon, 403 U.S. at 618-19.* The Court was careful not to impugn the integrity of the Community Education teachers, but it nonetheless found a substantial risk of inculcation "because the pressures of the environment might alter [their] behavior from its normal course." *Ball, 473 U.S. at 387,* citing *Wolman v. Walter, 433 U.S. 229, 247, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977).*

The Ball Court also found a "substantial risk of state-sponsored indoctrination" in the Shared Time program. *Ball, 473 U.S. at 387.* Notably, however, the Court did so by indulging in an assumption that the Agostini Court has now expressly disavowed -i.e., the assumption that public employees teaching on the premises of sectarian schools "may well subtly (or overtly) conform their instruction to the environment in which they teach...." *Id. at 388.* The quoted language encapsulates what the Agostini court identified as the first of three now-abandoned assumptions on which Ball relied. See *Agostini, 117 S. Ct. at 2010;* see also discussion supra Part II.C.1. By contrast, the Court invalidated the Community Education program, not because of any unfounded assumptions about public employees' behavior, but instead because of the genuine "conflict of functions" present when a teacher must fill two mutually-exclusive roles in the course of a single schooldays. See *Ball, 473 U.S. at 387.*

A few other aspects of Ball bear noting. First, the Court gave no weight to whether the courses offered by either program were "supplemental." Even if the courses offered were, as a matter of fact, "supplemental" insofar as they were not then offered by the nonpublic school, the Court observed that "there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first." *Id. at 396.* Instead of focusing on the "remedial" or "enrichment" aspects of the courses, the Court looked more broadly to their "general subject matter" (reading, mathematics, etc.), which was "surely a part of the curriculum in the past...." Id. Thus, "the concerns of the Establishment Clause may ... be triggered despite the 'supplemental' nature of the courses." Id.

Second, the Court noted that "respondents adduced no evidence of specific incidents of religious indoctrination in this case." *Id. At 388.* Nonetheless, the Court frankly observed that "the absence of proof of specific incidents is not dispositive," because neither the religious schools nor the teachers, parents and students would have any incentive "to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission." *Id. at 388-89.* The Court had earlier noted that neither the Community Education nor the Shared Time program was monitored for religious content. See *id. at 387.*

Finally, we think it especially noteworthy that Justice O'Connor (the author of Agostini) and (then) Chief Justice Burger dissented in Ball, but only as to the Shared Time program. Both invalidated the Community Education program. See *Ball, 473 U.S. at 398* (Burger, C.J., concurring in the judgment in part and dissenting in part), and *473 U.S. at 398-400* (O'Connor, J., concurring in the judgment in part and dissenting in part). Because Justice O'Connor gave

specific reasons for distinguishing the two programs, we reproduce here the final paragraph of her partial concurrence:

> I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach. I concur in the judgment of the Court that the Community Education program violates the Establishment Clause.

Id. at 398-400 (O'Connor, J., concurring in the judgment in part and dissenting in part).

D.

Having in some degree clarified the legal principles governing our discussion, we now apply them to the Louisiana special education program, as administered in Jefferson Parish. Naturally, we walk within the path recently marked out in Agostini. At the same time, however, we are

mindful that this is an area of constitutional law that is not blessed with easy answers. The most concrete tools at our disposal are the actual school aid programs the Supreme Court has either validated or invalidated. Thus, although we apply the analysis of Agostini, our ultimate goal is to determine whether the Louisiana special education statute is more like the constitutional aid programs approved by Agostini (i.e., the New York City program and the Grand Rapids Shared Time program) or more like the unconstitutional program condemned by Ball (the Community Education program). See, e.g., *Mueller, 463 U.S. at 393-94* (employing a similarly "comparative" analysis).

As we read Agostini, the Supreme Court has not abandoned, nor even fundamentally changed, the Lemon test. See *Agostini, 117 S. Ct. at 2010* ("To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since Aguilar was decided."). The first prong of Lemon, which asks whether a statute has a secular legislative purpose, remains unchanged. See *Lemon, 403 U.S. at 612-13.* The Court has, however, somewhat altered its "understanding of the criteria used to assess whether aid to religion has an impermissible effect." Id. Specifically, the Court has abandoned three of the assumptions which underlay the second ("effects") prong of Lemon in prior cases. Id.; see also discussion supra Part II.C.1. The Court has also expressly recognized that the third ("entanglement") prong of Lemon is more properly addressed as an aspect of the "effects" prong. *Agostini, 117 S. Ct. at 2015.* It thus seems that, fairly restated, the post-Agostini Lemon test includes the first ("secular purpose") prong plus the following, re-tooled "effects" prong:

> The three criteria we currently use to evaluate whether government aid has the effect of advancing religion:

> [does the aid] result in governmental indoctrination[?]; [does the aid] define its recipients by reference to religion[?]; or [does the aid] create an excessive entanglement[?]

Agostini, 117 S. Ct. at 2016 (brackets added).

1.

The Supreme Court has consistently found that even those State laws that run afoul of other aspects of Lemon may nonetheless have a "secular legislative purpose." See *Mueller, 463 U.S. at 394.* Following the Court's lead, then, we will exhibit a "reluctance [in] attributing unconstitutional motives" to the State of Louisiana as we examine whether "a plausible secular purpose for the state's program may be discerned from the face of the statute." *Id. at 394-95.*

We need not look far. The avowed purpose of the special education statute is "to assure and require that the state shall fund a program of special education and related services for the exceptional children of the state." LA.REV.STAT.ANN. § 17:1942 (West 1982). Nothing on the face of the statute belies the Legislature's purely secular aims in enacting it. Indeed, one of the public policies announced in the statute is to "prevent denials of equal educational opportunities on the basis of national origin, sex, economic status, race, religion, and physical or mental handicap or other exceptionalities in the provision of appropriate, free publicly supported education." LA.REV.STAT.ANN. § 17:1941 (West 1982)(emphasis added). We find that the equitable provision of special education services to exceptional children is a "secular legislative purpose" under Lemon. See, e.g., *Witters, 474 U.S. at 485-86.*

2.

The government may not participate in the indoctrination of religion, because such government activity "has the impermissible effect of advancing religion." *Agostini, 117 S. Ct. at 2010;* see *Lemon, 403 U.S. at 612.* It is as easy to agree with such a proposition in the abstract as it is difficult to apply it to a particular governmental program. The Lemon Court itself remarked that "the line of separation [between church and state], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on the circumstances of a particular relationship." *Lemon, 403 U.S. at 614.*

a.

Regarding indoctrination, Agostini first instructs us that the mere presence of a publicly paid teacher on sectarian school premises will no longer give rise to the presumption that those teachers will inculcate religion in their students. See *Agostini, 117 S. Ct. at 2011.* The record in this case discloses no evidence whatsoever that any of the special education teachers at the eight Jefferson Parish parochial schools have ever attempted to indoctrinate their students. The special education teachers are bound by law to teach only what is included in a student's IEP, and an IEP cannot describe religious instruction. We will not presume that qualified, conscientious state employees are violating the law.

The employment status of these special education teachers falls somewhere between the Title I instructors in Agostini and the Community Education teachers in Ball. The Jefferson Parish special education teachers are full-time public employees who are not concurrently employed by the parochial schools where they work. Thus, they do not suffer from the "conflict of functions" present in the Community Education teachers in Ball. See *Ball, 473 U.S. at 387.* Unlike the Agostini teachers, however, the Jefferson Parish teachers

are, in a sense, "permanently" assigned to their respective parochial schools under the terms of the Collective Bargaining Agreement. The Jefferson Parish teachers do not move from school to school, as the Agostini teachers do, and many of the Jefferson Parish teachers share the religious affiliation of their schools. See *Agostini, 117 S. Ct. at 2004.* We observe, however, that the Shared Time teachers in Ball were, in a significant number of cases, former employees of the schools at which they subsequently worked as State-paid teachers. See *Ball, 473 U.S. at 376.*

Naturally, the Jefferson Parish special education teachers have frequent contacts with their fellow sectarian teachers and the sectarian principals. The special education teacher may even consider him or herself an informal member of the parochial faculty, as evidenced by the fact that special education teachers attend monthly faculty meetings. But, while admitting that we strike a fine balance, we do not find that the Jefferson Parish special education teachers labor under the same, irreconcilable "conflict of functions" that spelled doom for the Community Education program in Ball, supra. The Jefferson Parish teachers are simply not asked to act in the capacity of a "religious school" teacher during one part of the day, and then to assume the purely secular role of a publicly-funded special education teacher during another.

We are somewhat troubled by the evidence indicating that the special education teachers are monitored by both public and sectarian entities. The record shows that special education teachers are subject to infrequent visits by state personnel and are otherwise subject to the regular, albeit non-personal, supervision of state IEP specialists. The record also shows, however, that SESC executive director Janz as well as the parochial school principals exercise some level of supervision over the special education teachers.

If the State delegated its supervisory authority over the special education program to the sectarian schools themselves, or to a sectarian institution such as the SESC, then the program might not withstand scrutiny under the Establishment Clause. See, e.g., *Wolman v. Walter, 433 U.S. 229, 252-55, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977).* We are not persuaded, however, that the State has abdicated its review of the substance of the special education instruction to the sectarian institutions. While the record does show limited supervision of the teachers by the SESC and the parochial school principals, that supervision seems more related to administrative matters than to assuring that the special education teachers do not impart religion to the students. The State, through its monitoring visits and through the IEP process, has retained sufficient authority over the substantive aspects of the special education instruction.

Agostini also instructs us that the mere presence of a publicly-paid teacher on religious school premises will no longer "create[] an impermissible 'symbolic link' between government and religion." *Agostini, 117 S. Ct. at 2011.* We need not long belabor this point, because the record discloses no evidence that the special education program has done anything more than place its teachers on sectarian school premises.[12] The fact that many of the teachers were formerly employed by the same schools is insufficient to create a "symbolic link" between church and state, given that many

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[12] While we certainly do not place our imprimatur on the presence of religious symbols in state-funded special education classrooms, the evidence indicating the presence, in one instance, of a crucifix in a classroom is insufficient to show that the Jefferson Parish special education program has created a "symbolic link" between church and state. Other evidence indicates that program monitors would remove such a symbol if they found it in a classroom, even though the State of Louisiana does not have an articulated policy requiring inspection for, and removal of, religious symbols from public classrooms.

of the Shared Time teachers in Ball shared a similar employment history. See *Ball, 473 U.S. at 376.* Our view is not altered by the fact that the special education teachers have limited "administrative ties" to the parochial schools -- i.e., they attend monthly faculty meetings; they can be assigned bus duty or lunch duty; etc. If the Supreme Court found it neither "sensible" not "sound" to make a program's constitutionality depend on where services were provided, we find it equally nonsensical and unsound to make its constitutionality turn on whether state-paid teachers attend faculty meetings or perform lunch duty. See *Agostini, 117 S. Ct. at 2012.*

Finally, Agostini informs us that not every form of government aid that "directly aids the educational function of religious schools is invalid." Id. at 2011. In distinguishing between valid and invalid direct aid, we look, per Agostini, to the criteria for distributing the aid and for identifying its beneficiaries, the means by which any of the aid might potentially benefit religious schools, and whether the aid "relieves sectarian schools of costs they otherwise would have borne in educating their students." Id. at 2012, citing *Zobrest, 509 U.S. at 12.* As discussed before, the District Court found that State funds are awarded to Jefferson Parish based on the number of exceptional students there. See discussion supra Part II.A. Whether or not a student qualifies as "exceptional" depends on entirely secular statutory criteria. See supra note 1; see also LA.REV.STAT.ANN. § 1943(2)(West Supp. 1998). Thus, the statutory scheme implementing the special education program shows that any aid is "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." *Agostini, 117 S. Ct. at 2011,* quoting *Witters, 474 U.S. at 487.*

Agostini seemed to require that "any money that ultimately went to [the sectarian schools] 'did so only as a result of the genuinely independent and private choices of' individuals." *Agostini, 117 S. Ct. at 2011-12,* quoting *Witters, 474 U.S. at 487;* see also *Zobrest, 509 U.S. at 9.* Relative to this requirement, the Court instructs us to examine the criteria by which the challenged program selects its recipients. *Agostini, 117 S. Ct. at 2012.* As we observed above, the Louisiana special education program selects its recipients based solely on the "exceptionality" of a particular student and on the number of exceptional students enrolled in a given school district. The fact that a particular exceptional student is enrolled in a particular school, be it sectarian or nonsectarian, results from a parental and not a governmental decision. Thus, any aid flowing incidentally to a sectarian school occurs "only as a result of the genuinely independent and private choices of" those students' parents. See *Zobrest, 509 U.S. at 9.*

Finally, Agostini mandates that any incidental benefits accruing to the sectarian schools as a result of the program cannot relieve the schools of costs they "otherwise would have borne in educating [their] students." *Agostini, 117 S. Ct. at 2012.* Failure to meet this requirement presupposes that the Jefferson Parish sectarian schools, in the absence of the special education program, would have "otherwise borne" the costs of providing special education services to their exceptional students. But only the State, and not the sectarian schools, has the legal duty to "provide an appropriate, free, publicly supported education to every exceptional child" residing in Louisiana. See LA.REV.STAT.ANN. § 17:1941 (West 1982). Since the sectarian schools are not required to provide such an education, we fail to see how the State's fulfilling its statutory obligation to do so relieves private schools of any burden at all. This case does not present the situation where the State furnishes aid which alleviates a

private school's legal duty to provide, for example, a state-mandated core curriculum to its students. Cf. *Ball, 473 U.S. at 396-97.*

The District Court made much of its conclusion that the sectarian schools receive a "direct economic benefit" as a result of the special education program, in the form of a student's tuition and the surcharge paid by parents to supplement the special education teachers' salaries. See *Helms, 856 F. Supp. at 1117-18;* see also discussion supra Part II.A. But to view the students' tuition as an "economic benefit" requires the assumptions that "the school makes a profit on each student; that, without the [special education program], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot." *Zobrest, 509 U.S. at 10-11.* The Supreme Court was unwilling to make such assumptions and regard the deaf student's tuition as an "economic benefit" in Zobrest. See id. Given the Court's close reliance on Zobrest in Agostini, we are likewise unwilling to make them. See *Agostini, 117 S. Ct. at 2012* ("In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA."), citing *Zobrest, 509 U.S. at 12.*

Additionally, the surcharge required of parochial school parents is merely intended to equalize the salaries of special education teachers working in nonpublic schools to those of special education teachers working in public schools. See *Helms, 856 F. Supp. at 1110, 1117.*[13] We do not view the receipt of such a surcharge from parents as any kind of "economic benefit" to the sectarian schools. The record indicates that the surcharges are paid into accounts

[13]In the public schools, this surcharge is paid by the JPSB. *Id. at 1110;* see discussion supra Part II.A.

earmarked for "special education expenses" and are used exclusively to supplement the salaries of special education teachers. *Id. at 1117.* The District Court thus erred when it considered this surcharge a "direct economic benefit" to the parochial schools. Indeed, there is no discernible "benefit" flowing to the schools from the surcharge; rather, the surcharge represents an economic burden imposed on the parents of parochial school children who wish to secure special education services for their children. The surcharge never reaches, in any meaningful way, the general coffers of the parochial schools.

b.

We need not long consider whether the criteria by which the special education program selects its beneficiaries "create a financial incentive to undertake religious indoctrination." *Agostini, 117 S. Ct. at 2014.* We have already observed, in Part II.D.2.a, supra, that the Louisiana special education program selects its aid beneficiaries based on neutral, secular criteria: the exceptionality of the child and the number of exceptional students enrolled in Jefferson Parish and in its individual school districts. These are "neutral, secular criteria that neither favor nor disfavor religion, and [the aid] is [therefore] made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini, 117 S. Ct. at 2014.* The Louisiana program does not "define its recipients with reference to religion" and therefore creates no financial incentive to undertake religious instruction. Id. at 2016. Indeed, as the District Court stated:

> The Court finds that there was no financial incentive for the parents of special education students to choose a nonpublic school. In fact, it is undisputed that the students would have received special education at no cost in the public schools. Indeed, the parents of special

> education students elected to pay an extra charge, in addition to the regular tuition, in order for their children to attend a parochial school.

Helms, 856 F. Supp. at 1117.

c.

We likewise discern no "excessive entanglement" created or necessitated by the special education program. Now that the Supreme Court has discarded the presumption that publicly-paid teachers on sectarian school premises will inculcate religion, also relegated to the dustbin is the "assumption that pervasive monitoring of [those teachers] is required." *Agostini, 117 S. Ct. at 2016.* We have not been shown any evidence demonstrating that the monitoring already in place is "insufficient to prevent or to detect inculcation." Id. The District Court specifically noted that "the JPPSS special education teachers at nonpublic schools do not teach religion" and that "the special education classrooms are used only for special education instruction." *Helms, 856 F. Supp. at 1114.* We see no reason to disturb those findings.

E.

In sum, we find that the Louisiana special education program, codified at LA.REV.STAT.ANN. § 17:1941-1956 (West 1982 & West Supp. 1998), does not offend the Establishment Clause because (1) the statute has a secular legislative purpose, and (2) the statute does not have the effect of advancing religion. See *Agostini, 117 S. Ct. at 2016.* We therefore REVERSE the judgment of the District Court and RENDER judgment declaring the Louisiana special education program constitutional as applied in Jefferson Parish.

III.

Plaintiffs also claim that Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("Chapter 2")[14] and its Louisiana counterpart, LA.REV.STAT.ANN. § 17:351-52 (West 1982 & West Supp. 1998), violate the Establishment Clause as applied in Jefferson Parish insofar as they provide direct aid to sectarian schools in the form of educational and instructional materials. Initially, the District Court agreed and granted Plaintiffs' motion for summary judgment, finding that the loan of state-owned instructional materials (such as slide projectors, television sets, tape recorders, maps, globes, computers, etc.) to pervasively sectarian institutions had the "primary effect of providing a direct and substantial advancement to the sectarian enterprise" and therefore violated the Establishment Clause. The court relied primarily on *Wolman v. Walter, 433 U.S. 229, 250, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977),* and *Meek v. Pittenger, 421 U.S. 349, 363, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975).*

When the case was reassigned due to Judge Frederick Heebe's retirement, Judge Marcel Livaudais granted Defendants' motion to reconsider the court's ruling. Following the reasoning of the Ninth Circuit in *Walker v. San Francisco Unified School District, 46 F.3d 1449, 1463-70 (1995),* Judge Livaudais found that the reasoning in Meek and *Wolman, supra,* had been undermined by subsequent Supreme Court cases. He therefore reversed

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[14] On October 20, 1994, Congress enacted the Improving America's School Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labeled "Subchapter VI -- Innovative Education Program Strategies" and is codified at *20 U.S.C. §§ 7301-7373* (West Supp. 1998). For ease of reference, we will continue to refer to new Subchapter VI as "Chapter 2." We will cite individual sections, however, by reference to citations in the current United States Code.

Judge Heebe's finding of unconstitutionality and granted Defendants' motion for summary judgment, declaring Chapter 2 and LA.REV.STAT.ANN. § 17:351-52 constitutional, facially and as applied in Jefferson Parish.

A.

Chapter 2 provides financial assistance through "block grants" to state and local educational agencies to implement eight "innovative assistance programs." See *20 U.S.C. §§ 7311*(b); 7312(a),(c)(1); 7351. The challenged innovative assistance program describes

> programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program.

20 U.S.C. § 7351(b)(2).

Chapter 2 services are to be provided to children enrolled in both "public and private, nonprofit schools." *20 U.S.C. § 7312*. Section 7372 provides that a local educational agency shall equitably provide "secular, neutral, and nonideological services, materials, and equipment" to students who are enrolled in private nonprofit elementary and secondary schools within its boundaries. *20 U.S.C. § 7372*(a)(1). Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, "funds from non-Federal sources." *20 U.S.C. § 7371*(b). The control of Chapter 2 funds, as well as title to all Chapter 2 "materials, equipment, and property," must be in a public agency, "and a

public agency shall administer such funds and property." *20 U.S.C. § 7372*(c)(1). In addition, any services provided for the benefit of private school students must be provided by a public agency or through a contractor who is "independent of such private school and of any religious organizations." *20 U.S.C. § 7372*(c)(2).

Once Louisiana receives its Chapter 2 funds from the Federal government, the designated State Educational Agency ("SEA") allocates 80 percent of the funds to Local Educational Agencies ("LEAs"). Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and private, nonprofit schools; 15% go to LEAs based on the number of children from low-income families. See *20 U.S.C. § 7312*(a). During the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds; about 70% of those funds were allocated to public schools and about 30% to nonpublic schools.

In 1984, the State instituted a monitoring process to ensure that Chapter 2 materials were not being used for religious purposes. Nonpublic schools were encouraged but not required to sign assurances that they would only use loaned materials for secular purposes. Additionally, LEAs made monitoring visits to nonpublic schools, and the State made monitoring visits to the LEAs and to some nonpublic schools. After the United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program in September, 1984, the Louisiana Department of Education made changes in monitoring LEAs. It increased, for example, the frequency of on-site visits by the Chapter 2 staff to LEAs from once every three years to once every two years.

The State also began reviewing the LEAs' monitoring process of the private schools. LEAs, however, have primary responsibility in Louisiana for monitoring their Chapter 2 programs and for compliance with all applicable State and Federal guidelines. When State Chapter 2 monitors visited the JPPSS in April, 1985, the monitors found that "the services, materials, equipment, [and] other benefits provided to nonpublic schools" in Jefferson Parish were not "neutral, secular and non-ideological."

A report of that evaluation prepared by the Bureau of Evaluation indicates that, while the LEAs "handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another." The report also states that "except that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed." During the 1986-87 fiscal year, for example, of the total amount of Chapter 2 funds budgeted for nonpublic schools ($214,080), $94,758 was spent to provide library/media materials, $102,862 was spent for instructional equipment, and $16,460 was spent for "local improvement programs."

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, stated that library books are ordered for nonpublic schools, but not for public schools. Such library books are stamped "ECIA Chapter 2." Woodward reviews the titles of books and other Chapter 2 materials and deletes titles she finds inappropriate. After reviewing library book orders from 1982, Woodward discovered approximately 191 titles in violation of Chapter 2 guidelines and had the books recalled and donated to the public library.

Woodward also stated that she generally makes a single visit to a given nonpublic school during the year. During her monitoring visits, she stated that she has "normally" found that the Chapter 2 materials and equipment are used in accordance with Chapter 2 guidelines. A review of the instructional materials purchased with Chapter 2 funds during 1986-87 and loaned to nonpublic, parochial schools reveals the following kinds of items: filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. Woodward stated that no direct payments of Chapter 2 funds are ever made to nonpublic schools; the funds are retained and administered by her office.

The Louisiana counterpart to Chapter 2, LA.REV.STAT.ANN. § 17:351-52 (West 1982 & West Supp. 1998), requires the State Board of Elementary and Secondary Education to "prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of [Louisiana] at the elementary and secondary levels...." LA.REV.STAT.ANN. § 17:351(A)(1)(West Supp. 1998). The statute also requires that the Board, or the State Department of Education, ensure that any books or instructional materials provided "are thoroughly screened, reviewed, and approved as to their content...." LA.REV.STAT.ANN. § 17:352(A)(1)(West Supp. 1998).[15] Judge Livaudais noted that an "overwhelming

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[15] An additional section, creating a "Teacher Supplies Fund," became effective June 30, 1997, after Judge Livaudais granted Defendants' motion for summary judgment. See LA.REV.STAT.ANN. § 17:354 (West Supp. 1998), added by Acts 1997, No. 473, § 1, eff. June 30, 1997. Section 354 is not at issue in this appeal, but we note in passing that it provides, inter alia, State funds "for the purchase and loan of teaching materials and supplies" to nonpublic schools, under constraints similar to those in Chapter 2.

portion" of funds allocated under the Louisiana statute are used to purchase textbooks, and that Plaintiffs have not challenged this application of the statute.

Deposition testimony indicated that library reference books purchased pursuant to LA.REV.STAT.ANN. § 17:351 are ordered from lists approved by the Louisiana Board of Elementary and Secondary Education. Additionally, books and instructional materials may only be ordered from state-approved lists and sources.

B.

We will focus on the Ninth Circuit's decision in Walker, supra, because Judge Livaudais relied heavily on its reasoning and also because it is the only other Circuit decision to have addressed the constitutionality of Chapter 2.

In Walker, a panel of the Ninth Circuit confronted a Chapter 2 program that was, in all relevant respects, identical to the one we confront in Jefferson Parish. [16] The most significant aspect of the Walker panel's reasoning is devoted to assessing whether Chapter 2 has a "primary or principal effect of advancing religion."[17] *Walker, 46 F.3d at 1464-69.* The panel began by observing that, with the cases of Meek, *Wolman and Board of Education v. Allen, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968),* the Supreme Court

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[16] Aside from the identical statutory provision governing the Walker program, the percentage distribution of Chapter 2 funds for the 1988-89 school year were substantially similar to figures for the Jefferson Parish program: 74% of Chapter 2 benefits to public schools and 26% to private schools in Walker, compared to, e.g., a 70%/30% split in Jefferson Parish during the 1984-85 school year.

[17] The panel easily concluded that Chapter 2 has the valid secular purpose of "improving education." *Walker, 46 F.3d at 1464,* citing *Meek, 421 U.S. at 363.*

"drew a [constitutional] distinction between providing textbooks and providing other instructional materials -- such as maps, overhead projectors, and lab equipment -- to parochial schools or their students." *Walker, 46 F.3d at 1464-65;* see *Allen, 392 U.S. at 248; Meek, 421 U.S. at 362-63; Wolman, 433 U.S. at 237.* The panel, however, was not convinced that such a distinction was still the law. In its view, subsequent Supreme Court cases -- particularly, *Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1980),* Ball, supra, and Zobrest, supra -- had "clarified the holdings of Meek and Wolman, and rendered untenable the thin distinction between textbooks and other instructional materials." *Walker, 46 F.3d at 1465.* The Ninth Circuit thus held that "under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." Id.

The panel read Meek as an illogical departure from Allen, which had upheld a law requiring public school authorities to lend textbooks, free of charge, to both public and private school students. *Allen, 392 U.S. at 248.* The panel pointed out that "Allen ... rests on the robust principle that 'the Establishment Clause does not prohibit a State from extending the benefits of state laws to all citizens without regard for their religious affiliation." *Walker, 46 F.3d at 1465,* quoting *Allen, 392 U.S. at 242.* In the panel's view, however, the Court's subsequent decision in Meek departed from Allen's reliance on neutrality when Meek "upheld the provision of textbooks to parochial school students, but struck down the program which loaned instructional materials and equipment...." *Walker, 46 F.3d at 1465* (citations omitted); see *Meek, 421 U.S. at 362, 365-66, 44 L. Ed. 2d 217, 95 S. Ct. 1753.*

Even though the Court's subsequent decision in Wolman explicitly upheld Meek, the Walker panel believed that "in reaffirming Meek's holding ... Wolman undermined Meek's rationale." *Walker, 46 F.3d at 1465;* see *Wolman, 433 U.S. at 238* (upholding Meek and Allen). Specifically, the panel concluded that Wolman had "eviscerated" Meek's premise that "any state aid to the educational functions of a sectarian school is forbidden." *Walker, 46 F.3d at 1465.* Wolman did so, the panel reasoned, by "holding as constitutional a statute under which the State prepared and graded tests in secular subjects" for both public and private, parochial schools. Id. Thus, the Walker panel announced that the paltry sum of Meek and Wolman was

> the thin distinction -- unmoored from any Establishment Clause principles -- that state loans to parochial schools of instructional materials and equipment impermissibly advances religion, but state preparation and grading of tests and state loans of textbooks do not.

Walker, 46 F.3d at 1466.

In the panel's estimation, the true death-blow to Meek's textbooks vs. other instructional materials dichotomy came three years later in Regan, which "recognized this weak distinction and clarified that the provision of instructional materials and equipment to parochial schools is not always prohibited." *Walker, 46 F.3d at 1466.* But, as the panel recognized in the next sentence, Regan merely reaffirmed Wolman by "upholding a law reimbursing parochial schools for the costs of administering tests required by the State." Id.; see *Regan, 444 U.S. at 655* ("We agree with the District Court that Wolman controls this case."). Although Regan did not deal with the provision of instructional materials to parochial schools, and although Regan explicitly followed

Wolman and said nothing about overruling Meek, the Walker panel nonetheless declared with perfect candor that

> Regan thus instructs us that the difference between textbooks and other instructional equipment and materials, such as science kits and maps, is not of constitutional significance.

Walker, 46 F.3d at 1466. In our view, such a statement could only mean that the panel thought Regan silently overruled Meek.

The Walker panel thus adopted an Establishment Clause analysis based on what it identified as "the underlying principle animating Establishment Clause jurisprudence: government neutrality towards religion." *Id. at 1466,* citing, inter alia, *Zobrest, 509 U.S. at 10.* The panel stated its "test" as follows:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state.

Walker, 46 F.3d at 1467. Applying its test, the panel easily found that Chapter 2 passed constitutional muster. First, it found that Chapter 2 benefits were "neutrally available without regard to religion" given that "an overwhelming percentage of beneficiaries [were] nonparochial schools and their students." Id.[18] Second, the panel found that the constraints under which Chapter 2 services were provided

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[18] The panel also found that, given the de minimis aid provided per student ($6.65 per student in 1988-89), "it is no surprise that Chapter 2 funds are supplementary and cannot supplant the basic educational services of the religious schools." Id.

"adequately safeguarded Chapter 2 benefits from improper diversion to religious use." Id. at 1467-68. Finally, the panel reasoned that, if the state-paid interpreter on sectarian school premises in Zobrest did not create a symbolic union between government and religion, then "certainly having religiously neutral material and equipment in the same classroom does not create a symbolic union either." Id. at 1468, citing *Zobrest, 509 U.S. at 13.*

Although it had already established (to its own satisfaction) that Meek and Wolman were no longer good law, the panel went on to distinguish the aid programs in those cases from Chapter 2:

> The statutes struck down in Meek and Wolman are fundamentally different from the Chapter 2 statute at issue here. The statute in Meek was not neutral because it provided close to $12 million in aid that was targeted directly at private schools, of which more than 75% were church-related. Similarly, in Wolman, the statute was not neutral because it provided $88.8 million in aid that was targeted directly at private schools, of which 96% were church-related and 92% were Catholic. Here, seventy-four percent of Chapter 2 benefits went to public schools. Of the remaining twenty-six percent ... a substantial portion was allocated to nonreligious private schools. Indeed, over thirty percent of the private schools under the Chapter 2 program are nonreligious. Thus, unlike the statutes in Meek and Wolman, Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools.

Walker, 46 F.3d at 1468. [19]

The Walker panel decision is not without its detractors, however. While Judge Fernandez agreed with the panel majority that the distinction drawn in Meek between textbooks and educational materials was "untenable," he nevertheless believed that Meek was still binding law. See *Walker, 46 F.3d at 1470* (Fernandez, J., concurring and dissenting)("[The Supreme] Court has given us the book-for-kids versus materials-for-schools dichotomy. Only it can take it away."). Additionally, the Ninth Circuit's refusal to rehear the case en banc provoked a vituperative dissent by Judge Reinhardt (joined by Judges Pregerson and Hawkins). Judge Reinhardt excoriated the panel majority for shirking its "clear duty to invalidate the San Francisco Unified School District's provision of videos, overhead projectors, televisions, record players, and similar equipment to parochial schools." *Walker v. San Francisco Unified School District, 62 F.3d 300, 301 (1995)*(Reinhardt, J., dissenting from denial of en banc rehearing). Judge Reinhardt repeatedly emphasized that Meek and Wolman were still binding precedent and that "the distinction between textbooks and other educational materials is so clear and well-established as to defy legitimate judicial evasion." Id.

C.

When we carefully review the Supreme Court's pronouncements in Allen, Meek, Wolman, and Regan, it is tempting to complain that the high Court has instructed us

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[19] The panel also found that Chapter 2 did not violate the "entanglement" prong of Lemon, given the minimal intrusion onto the parochial schools premises by State monitors, and also given the "self-policing" nature of the neutral instructional materials and equipment. *Walker, 46 F.3d at 1469,* citing, inter alia, *Meek, 421 U.S. at 365,* and *Zobrest, 509 U.S. at 13-14.*

confusingly. As merely one example, the Court in Allen registered its disagreement with the proposition "that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen, 392 U.S. at 248.* Only seven years later, however, the Court was heard to say in Meek that "the secular education [that parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Meek, 421 U.S. at 366,* quoting *Lemon, 403 U.S. at 657* (opinion of Brennan, J.)(emphasis added). Lest we fall into despair, however, we will view the Court's cases dealing with state aid to religious schools more in terms of what they did rather than what they said.

When we take that approach, the solution becomes compellingly clear and simple. Meek and Wolman have squarely held that what the government is attempting to accomplish through Chapter 2, it may not do. No case has struck down Meek or Wolman. We could take out our judicial divining rod and try to predict, on the basis of what has been said since Meek and Wolman, what the present Court would do if called upon to weigh the constitutionality of Chapter 2. But such a course would, we think, take us beyond our role as a Circuit Court of Appeals, bound to follow the dictates of the Supreme Court. And if our duty were not already clear enough, the Court has recently reminded us of it in Agostini:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should

> follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini, 117 S. Ct. at 2017, quoting *Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)*(emphasis added).

Meek invalidated a Pennsylvania statute that authorized the Secretary of Education to lend to parochial schools "instructional materials" which included "periodicals, photographs, maps, charts, sound recordings, films, ... projection equipment, recording equipment, and laboratory equipment." *Meek, 421 U.S. at 354-55, 366;* see also *Meek, 421 U.S. at 354 n.4* (complete statutory definition of "instructional materials."). Meek is directly on point and has not been overruled by any Supreme Court case. We thus "follow the case that directly controls." See *Agostini, 117 S. Ct. at 2017.*

In Allen, Meek, Wolman, and Regan, the Court drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid itself. Allen approved textbook loans to parochial schools because the evidence did not indicate that "all textbooks ... are used by the parochial schools to teach religion." *Allen, 392 U.S. at 248.* While recognizing that books, if they were religious books, could have the effect of indoctrination, the Allen Court likened the purely secular books at issue there to the bus transportation subsidized in *Everson v. Board of Education, 330 U.S. 1, 17, 91 L. Ed. 711, 67 S. Ct. 504 (1947):* neither bus rides nor purely secular textbooks had "inherent religious significance." *Allen, 392 U.S. at 244.* While Justices Black and Douglas dissented in Allen, they did so based on a different conception of the role of textbooks in parochial schools. See *Allen, 392 U.S. at 252* (Black, J., dissenting)("Books are the

most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit."), and *Allen, 392 U.S. at 257*(Douglas, J., dissenting)("The textbook goes to the very heart of the education in a parochial school."). Both the majority and the dissenting opinions, however, consistently focused on the character of the aid given to parochial schools.

Meek and Wolman, while both reaffirming Allen, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren. Meek merely intimated that the character of the aid was the determinative feature in its holding. See *Meek, 421 U.S. at 364* ("[A] State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities -- secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school.")(emphasis added). But Wolman clarified that, in the Court's view, the character of the aid itself determined whether the aid was constitutional. Wolman did so by upholding several different types of aid (textbooks, administration of state-required standardized tests, speech/hearing diagnostic services, off-premises therapeutic/guidance/remedial services), while at the same time striking down, based on Meek, the loan of instructional materials to parochial schoolchildren. See *Wolman, 433 U.S. at 236-38, 238-41, 241-244, 244-248, 248-252.* The Wolman Court distinguished among these various types of aid by reference to the particular attributes of the aid itself. See, e.g., *Wolman, 433 U.S. at 244*("Diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school."). Wolman candidly recognized the "tension" existing between the holdings in Meek and Allen and sought to resolve that tension by emphasizing the unique

character of the aid approved in Allen, i.e., that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." See *Wolman, 433 U.S. at 251 n.18;* see also *Committee for Public Education v. Nyquist, 413 U.S. 756, 781-82, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973).*

Contrary to the Walker panel's view, Regan did nothing to "instruct us that the difference between textbooks and other instructional equipment and materials ... is not of constitutional significance." *Walker, 46 F.3d at 1466.* Regan did exactly the opposite. In seeking to harmonize the holdings of Meek and Wolman, the Regan Court merely observed that Meek did not forbid all types of aid to sectarian schools. See *Regan, 444 U.S. at 661* . Indeed, as the Regan Court realized, if Meek stood for such a proposition, then Wolman's approval of, for example, the testing and grading services would have flown in the face of precedent. See id. Regan clarified that Meek only invalidates a particular kind of aid to parochial schools -- the loan of instructional materials. See *id. at 662.*

The Walker panel made a flawed attempt to avoid the holdings of Meek and Wolman by "distinguishing" the statutes at issue in those cases from the Chapter 2 program. The panel opined that the Meek and Wolman statutes were "fundamentally different" from Chapter 2 because they were not "neutral." *Walker, 46 F.3d at 1468.* By this, the panel meant that the challenged programs in Meek and Wolman directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated. See id. By contrast, the panel distinguished Chapter 2 as a "neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." Id. But Walker misunderstood the aid programs struck down in Meek and Wolman.

Those cases dealt with general aid programs designed to provide equitable benefits to both public and nonpublic schoolchildren. See *Meek, 421 U.S. at 351-52* ("With the stated purpose of assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools, the Pennsylvania General Assembly in 1972 added Acts 194 and 195 to the Pennsylvania Public School Code of 1949.")(citations omitted)(emphasis added), and *Wolman, 433 U.S. at 234* ("All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in public schools.")(emphasis added). The Meek and Wolman Courts, however, dedicated their discussion to those parts of the programs that channeled aid to nonpublic schools, because it was the character of the aid provided to those schools, and not the relative percentages of aid distributed between public and nonpublic schools, that was determinative. See *Walker, 62 F.3d at 302 n.1* (Reinhardt, J., dissenting from denial of en banc rehearing). Thus, the percentages discussed in Meek and Wolman were completely irrelevant to the constitutionality of the programs at issue there, as was the fact that the general aid programs might have been implemented by two separate statutes. The Court observed in Meek, in a different context, that "it is of no constitutional significance whether the general program is codified in one statute or two." *Meek, 421 U.S. at 360 n.8.*

Since Walker was decided before the Supreme Court handed down Agostini, we should add that Agostini also does not overrule Meek or Wolman; nor does Agostini dismantle the distinction between textbooks and other educational materials. In fact, Agostini does not even address that issue. Agostini does, it is true, discard a premise on

which Meek relied -- i.e., that "substantial aid to the educational function of [sectarian] schools ... necessarily results in aid to the sectarian school enterprise as a whole." *Meek, 421 U.S. at 366* (emphasis added). But Agostini does not replace that assumption with the opposite assumption; instead, Agostini only goes so far as to "depart[] from the rule ... that all government aid that directly aids the educational function of religious schools is invalid." *Agostini, 117 S. Ct. at 2011* (emphasis added). Agostini holds only that the aid at issue there (i.e., the on-premises provision of special education services by state-paid teachers) was not the kind of governmental aid that impermissibly advanced religion. Id. at 2016. Agostini says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling Meek or Wolman. Agostini only instructs us that Meek's presumption regarding instructional materials should not be applied to state-paid teachers on parochial schools premises. See *Agostini, 117 S. Ct. at 2012;* see also *Ball, 473 U.S. at 395-96* (applying Meek and Wolman to state-paid teachers).

D.

Applying Meek and Wolman, we hold that Chapter 2, *20 U.S.C. §§ 7301-7373*, and its Louisiana counterpart, LA.REV.STAT.ANN. §§ 17:351-52 (West 1982 & West Supp. 1998), are unconstitutional as applied in Jefferson Parish, to the extent that either program permits the loaning of educational or instructional equipment to sectarian schools. By prohibiting the loaning of such materials, our decree encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc. See, e.g., *Meek, 421 U.S. at 354 n.4.* Our decree also necessarily prohibits the furnishing of library books by the State, even

from prescreened lists. We can see no way to distinguish library books from the "periodicals ... maps, charts, sound recordings, films, or any other[] printed and published materials of a similar nature" prohibited by Meek. See *id. at 355* (internal quotes omitted). The Supreme Court has only allowed the lending of free textbooks to parochial schools; the term "textbook" has generally been defined by the case law as "a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends." *Allen, 392 U.S. at 239 n.1.* We do not think library books can be subsumed within that definition.

We therefore REVERSE Judge Livaudais' grant of summary judgment in favor of Defendants and RENDER judgment declaring Chapter 2, *20 U.S.C. §§ 7301-7373*, and its Louisiana counterpart, LA.REV.STAT.ANN. §§ 17:351-52, unconstitutional as applied in Jefferson Parish.

IV.

Plaintiffs also challenge an agreement between the JPSB and the Jefferson Non-Public School Transportation Corporation (the "Corporation") entered into pursuant to LA.REV.STAT.ANN. § 17:158 (West 1982 & West Supp. 1998), under which the JPSB makes payments to the Corporation, which in turn arranges transportation for students to six parochial schools in Jefferson Parish. Plaintiffs argue that the agreement impermissibly delegates civil authority to a group (the Corporation) dedicated to serving religious interests, in violation of the Establishment Clause, and furthermore that the agreement violates the neutrality requirements of the Establishment Clause by privileging six sectarian schools over other public and nonpublic schools. The District Court, after a bench trial, disagreed, finding the arrangement constitutionally indistinguishable from the arrangement upheld in *Everson v.*

Board of Education of Ewing, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947). See generally, *Helms, 856 F. Supp. at 1133-55.*

A.

Louisiana law requires that "each parish and city school board shall provide free transportation for any student attending a school of suitable grade approved by the State Board of Elementary and Secondary Education within the jurisdictional boundaries of the parish or school board if the student resides more than one mile from such school." LA.REV.STAT.ANN. § 17:158(A)(1)(West Supp. 1998). A subsection of the same statute provides that "nothing ... shall prohibit a parish or city school from entering into contracts or mutual agreements for providing school bus transportation." LA.REV.STAT.ANN. § 17:158(A)(4) (West Supp. 1998). The JPPSS provides free transportation to eligible public and nonpublic school students. Since 1988, nonpublic and public student bus transportation has been funded through separate appropriations of state funds. Bus drivers are paid through a combination of state funds and local supplements.

During the 1988-89 school year, funding reductions for Jefferson Parish nonpublic school transportation caused the JPSB to cut local supplements for nonpublic schools. To make up for the shortfall, the Archdiocese of New Orleans agreed to contribute funds and thereby ensure the restoration of certain Catholic, nonpublic schools' transportation services to the prior year's level. Parents of schoolchildren at those nonpublic schools were thereafter required to pay a supplement to offset transportation costs. Nevertheless, the JPSB discontinued some of the nonpublic school transportation in May 1988, because JPSB had not received all of the necessary funds from those nonpublic schools.

In 1989, the State increased nonpublic school transportation funding to Jefferson Parish by $278,788, for a total of $1,490,637. The Archdiocese of New Orleans and the State decided that part of these additional funds would be used to provide privately contracted bus service for those students who had been eliminated from the transportation plan. Consequently, the Jefferson Non-Public School Transportation Corporation was formed on September 28, 1989. The stated purposes of this non-profit Corporation included

> [the provision of] transportation for the children of parents residing in the Parish of Jefferson who have enrolled their children in parochial schools within the Parish of Jefferson other than their own church parish because of the fact that the parish in which said parents reside does not operate a parochial school....

Helms, 856 F. Supp. at 1149. The Corporation had members from six nonpublic schools: St. Christopher, St. Catherine of Siena, St. Louis King of France, St. Agnes, St. Angela Merici, and St. Matthew the Apostle.

On February 6, 1990, JPSB paid the Corporation $100,195 "in lieu of transportation services previously provided by the [JPPSS] for some of the students attending [the six Catholic schools]." Id. The Corporation paid the funds to "privately contracted bus drivers" who provided bus services to 368 students attending the six schools. *Id. at 1149-50.* The District Court specifically found that "the funds paid to the [Corporation] were clearly spent for transportation of nonpublic school students." *Id. at 1150.*

B.

We agree with the District Court that the agreement between the JPSB and the Corporation to provide funds for the transportation of nonpublic school children does not violate the Establishment Clause. See *Helms, 856 F. Supp. at 1150-55.* The allocation of funds to the Corporation is simply one part of a broader, general program by which the State and Jefferson Parish provide a secular, noninstructional service to sectarian and nonsectarian schoolchildren alike.

The Supreme Court's decisions in Everson and Wolman furnish the guideposts for our discussion, although, as we make clear below, the Jefferson Parish program we confront here falls somewhat between the facts of those cases. In Everson, the Court approved a New Jersey program by which the State reimbursed parents for the cost of sending their children to and from school, whether public or parochial. *Everson, 330 U.S. at 17.* The Court analogized the reimbursement to situations "where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools," or where "state-paid policemen ... protect children going to and from church schools." Id. Such services, in the Court's view, were "separate and ... indisputably marked off from the [schools'] religious function." *Id. at 18.* Wolman restated the holding in Everson in the following way:

> The critical factors ... are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in Everson passed constitutional muster because the school did not determine how often the pupil traveled between home and school -- every child must make one round trip every day -- and because the travel was unrelated to any aspect of the curriculum.

Wolman, 433 U.S. at 253.

Wolman, by contrast, invalidated an Ohio statute which authorized the State to expend funds to provide "field trip transportation" to nonpublic school students on an equal basis with public school students. The Court pointed out that in Wolman, unlike Everson, the nonpublic school controlled "the timing of the trips and, within a certain range, their frequency and destinations." Id. Additionally, the Court believed that "field trips," given the inevitable discussion accompanying them and the parochial schoolteacher's input and guidance, "are an integral part of the educational experience." *Id. at 253-54.*

The Jefferson Parish program falls somewhere in the gray area between Everson and Wolman. Certainly the content of the aid provided through the JPSB-Corporation agreement is for our purposes identical to the aid provided in Everson: getting a child to and from school once a day. There is no evidence, as the District Court found, that the funds were used for anything other than such transportation. See *Helms, 856 F. Supp. at 1150.* The means by which the aid was administered, however, bear a vague resemblance to Wolman. The funds are paid, not as reimbursements to parents, but instead as a subsidy for transportation costs to a private, non-profit corporation, whose "members" were parents of children attending the six schools at issue.[20] This system is at least superficially similar to the direct payments, over which the nonpublic schools had virtually unfettered discretion, condemned in Wolman. See *Wolman, 433 U.S. at 253-54.*

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[20] In rejecting the Plaintiffs' Motion for Reconsideration of Judge Heebe's ruling on the transportation issue, Judge Livaudais found that the Corporation was "non-religious and was set up exclusively to hire bus drivers to drive these children to and from school...."

Although again we must perform a balancing act between permissible and impermissible aid to sectarian institutions, we find that the arrangement at issue here bears more of a resemblance to the program upheld in Everson than to the one struck down in Wolman. The primary consideration guiding us is the character of the aid provided. Here, as in Everson, the payments are earmarked for a wholly secular function lacking in any educational content whatsoever -- the transportation of schoolchildren to and from school. There is no danger, as there was in Wolman, that parochial teachers will subvert the state-funded process to further their own sectarian aims; indeed, the religious teachers have no role in this kind of transportation, and, as the District Court assured us, "there has been no evidence presented that JPPSS bus drivers might impart religious beliefs to their bus passengers." *Helms, 856 F. Supp. at 1151.*

Although the means through which the aid gets to religious institutions -- the Corporation -- did give us pause initially, in the end we believe that the Corporation serves merely an administrative function in the aid process. The Corporation acts as a conduit through which the funds pass and is administered by the parents of schoolchildren. The Supreme Court has already approved direct reimbursements to parents in Everson; it would exalt form over substance to draw a constitutional distinction where the funds are paid, not to the parents themselves, but to a private corporation with the same parents as members. Furthermore, we have seen no evidence indicating that the Corporation exercises unfettered discretion over the funds. Instead, as both District Judges who considered the issue concluded, the Corporation is dedicated exclusively to facilitating secular transportation services for its members' students and has no religious objectives at all. Finally, no evidence indicates that the funds were used for anything but the permissible purpose of

providing transportation services to nonpublic schoolchildren. See *Helms, 856 F. Supp. at 1150.*

We also reject Plaintiffs' argument that the transportation payments violate the neutrality requirements of the Establishment Clause because the Corporation is dedicated to serving only six nonpublic schools. This contention overlooks the fact that the Corporation focused on the six schools at issue because they had been excluded from local funding due to cuts in transportation funds from the state. Thus, the Corporation exists, not to privilege these six parochial schools, but instead to bring them to a level of services equal to other schools. Finally, the eligibility requirements for transportation aid are generally applicable to all students, both public and nonpublic. Any differences among the level of services provided from school to school (e.g., frequency and pattern of busing routes, local supplement levels, etc.) arise from administrative concerns that have nothing to do with religion. Indeed, as the district court, found, although the State strives to make transportation services available equitably to both public and nonpublic students, "it appears ... that greater benefits are provided to the public school students." *Helms, 856 F. Supp. at 1152.* We cannot understand how the Plaintiffs then complain that the transportation payment scheme operates to the unfair benefit of the six Catholic schools at issue here.

Based on Everson and Wolman, we AFFIRM the District Court's determination that the transportation payments to the Corporation, by virtue of LA.REV.STAT.ANN. § 17:158, are constitutional.

V.

In sum, then, (1) we REVERSE the District Court's decision in favor of Plaintiffs and RENDER judgment in

favor of Defendants declaring the Louisiana special education program, LA.REV.STAT.ANN. § 17:1941-1956, constitutional as applied in Jefferson Parish; (2) we REVERSE the District Court's grant of summary judgment in favor of Defendants and RENDER judgment in favor of Plaintiffs declaring that the Federal instructional materials program, *20 U.S.C. §§ 7301-7373*, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52 are unconstitutional as applied in Jefferson Parish, except as applied for the acquisition of textbooks which use is not challenged by this litigation; and, (3) we AFFIRM the District Court's decision in favor of Defendants that the transportation payments to the Jefferson Non-Public School Transportation Corporation, by virtue of LA.REV.STAT.ANN. § 17:158, are constitutional.

AFFIRMED in part; REVERSED in part and JUDGMENT RENDERED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 85-5533 SECTION "E"

MARY L. HELMS, ET AL

v.

WILMER CODY, ET AL

January 28, 1997, FILED;
January 29, 1997, ENTERED

COUNSEL: For MARY L HELMS, individually and as next friend of Amy T. Helms, a minor, plaintiff: Alice M. Jacobs, Alice M. Jacobs, Attorney at Law, New Orleans, LA.

For THOMAS G CLAUSEN, as Louisiana State Superintendent of Instruction, defendant: William Joseph Guste, Jr., William J. Guste, Jr., Attorney at Law, New Orleans, LA.

JUDGES: MARCEL LIVAUDAIS, JR., United States District Judge

OPINIONBY: MARCEL LIVAUDAIS, JR.

OPINION: ORDER AND REASONS

This cause came on for hearing on various days on post-judgment motions including:

1. Motion of the Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Reconsideration of this Court's Ruling on the Chapter 2 Program as Administered in Jefferson Parish, Louisiana (Doc. 353);

2. Motion of Intervenors, Guy Mitchell,Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Reconsideration of the Court's March 1990 Summary Judgment Order on the Chapter 2 Program and the Louisiana State School Books and Materials Program, as Applied in Jefferson Parish, Louisiana (Doc. 367);

3. Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Alter or Amend this Court's Judgment of July 25, 1994, in which this Court declared unconstitutional and enjoined portions of the federal Chapter 2 program as administered in Jefferson Parish, Louisiana (Doc. 379);

4. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, to Alter or Amend the Court's Judgment of July 25, 1994, with respect to Chapter 2 and the Louisiana state books and materials program (Doc. 380);

5. Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and

the United States Department of Education, to Stay the Judgment Entered by this Court on July 25, 1994 (Doc. 381);

6. Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, to Partially Stay the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program in Jefferson Parish (Doc. 384);

7. Amended Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Partial Stay of the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program and La.R.S. 17:351-52 in Jefferson Parish (Doc. 392);

8. Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Partial Stay of the Implementation of the Court's July 25, 1994 Judgment with Respect to Chapter 2, the Louisiana State Books and Materials Program (Doc. 394);

9. Motion of Plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, to Alter or Amend the Judgment regarding the School Bus Transportation Program (Doc. 388); and

10. Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Leave of

Court to Adopt Amendment to the Regulations Governing Reimbursement for Required Services (Doc. 455).

This civil action was assigned to Judge Frederick J. R. Heebe, who entered summary judgment rulings, conducted the non-jury trial, issued Findings and Conclusions and Judgment on all issues presented in the complaint, and took under submission the various post-trial motions. Upon Judge Heebe's retirement, this action was re-allotted to this section of the Court for consideration. The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule.

REASONS

Motions relating to Chapter 2 and Louisiana School Books Programs

On March 27, 1990, the previous court granted the motion of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for summary judgment, holding that Chapter 2 of the Elementary and Secondary Education Act of 1965, *20 U.S.C. §§ 2701*-3341,[1] and the Louisiana equipment and materials statute, La.Rev.Stat. §§ 17:351-54, are unconstitutional. Doc. 220. The previous court applied the three part test set forth in *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1976)*, to determine whether government aid to private schools is constitutional. It found (1) that the primary beneficiaries of the aid are nonpublic schools; (2) that the majority of the

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[1] This Act was amended, renumbered, reorganized, and expanded by Public Law 103-382, October 20, 1994. It has now been moved to *20 U.S.C. § 7301*-7373.

schools receiving the aid are pervasively sectarian; and (3) that the aid has the impermissible effect of advancing religion. Doc. 220.

The parties have now requested several remedies concerning the Chapter 2 ruling:

1. Both federal defendants and intervenors have filed motions asking that the court reconsider its 1990 summary judgment order.

2. Both federal defendants and intervenors have filed motions to alter or amend the Judgment of July 25, 1994 with respect to Chapter 2 and the Louisiana State Books and Materials Program.

3. The federal defendants, the state defendants, and the intervenors ask for a stay pending final disposition of any appeals to the Fifth Circuit Court of Appeals. Plaintiffs oppose all of the motions for a stay of the July 25, 1994 judgment as it concerns the Chapter 2 program.

"Chapter 2" refers to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965. On October 20, 1994, Congress enacted the Improving America's Schools Act of 1994, Pub.L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labelled "Subchapter VI - Innovative Education Program Strategies" and is codified at *20 U.S.C. §§ 7301-7373*. However, for ease of reference, this Court will continue to refer to the new Subchapter VI as "Chapter 2."

Chapter 2 provides financial assistance to state educational agencies ("SEAs") and local educational agencies ("LEAs") to implement eight "innovative assistance" programs. *20 U.S.C. §§ 7351*(a) & (b). The innovative assistance programs are:

(1) technology related to the implementation of school-based reform programs, including professional development to assist teachers and other school officials regarding how to use effectively such equipment and software;

(2) programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program;

(3) promising education reform projects, including effective schools and magnet schools;

(4) programs to improve the higher order thinking skills of disadvantaged elementary and secondary school students and to prevent students from dropping out of school;

(5) programs to combat illiteracy in the student and adult population, including parent illiteracy;

(6) programs to provide for the educational needs of gifted and talented children;

(7) school reform activities that are consistent with the Goals 2000: Educate America Act; and

(8) school improvement programs or activities under sections 6317 and 6318 of this title.

20 U.S.C. § 7351(b).

Plaintiffs' challenge in this case is limited to the innovative assistance program under *20 U.S.C. § 7351*(b)(2) in Jefferson Parish, Louisiana.

Chapter 2 services are to be provided to children enrolled in both public and private nonprofit schools. *20 U.S.C. §§ 7312, 7372*. *20 U.S.C. § 7372* provides for the participation of children enrolled in private nonprofit elementary and secondary schools. § 7372(a)(1) states:

> To the extent consistent with the number of children in the school district of a local educational agency which is eligible to receive funds under this subchapter or which serves the area in which a program or project assisted under this subchapter is located who are enrolled in private nonprofit elementary and secondary schools, or with respect to instructional or personnel training programs funded by the State educational agency from funds made available for State use, such agency, after consultation with appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary for their provision . . ., or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter.

(Emphasis added).

Chapter 2 funds for the innovative assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Chapter 2 funds, would be made available for those programs from "non-Federal sources." *20 U.S.C. § 7371*(b).

Chapter 2 also requires that the control of all Chapter 2 funds "and title to materials, equipment, and property . . . shall be in a public agency . . . and a public agency shall administer such funds and property." *20 U.S.C. § 7372*(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who "is independent of such private school and of any religious organizations." *20 U.S.C. § 7372*(c)(2).

Pursuant to Louisiana law, the Louisiana Superintendent of Public Instruction, defendant, Cecil J. Picard, is the designated SEA for Louisiana. See State of Louisiana Chapter 2 Guidelines, June 1989 at 1 [Fed. Ex. D-4]. The State Bureau of Consolidated Educational Programs, which was headed by Dan K. Lewis, Ph.D. at the time of trial, administers the Louisiana Chapter 2 Program. Once Louisiana receives its Chapter 2 funds from the federal government, the SEA allocates 80 percent of the funds to LEAs. Id. at 2-3. Eighty-five percent of those funds are earmarked for LEAs based on the number of participating elementary and secondary school students in both public and nonprofit, private schools and 15% based on the number of children from low-income families. Id. at 3.

Dr. Lewis stated in his deposition that about 25% of the Chapter 2 funds are allocated to the nonpublic school sector. Lewis Dep., p. 15. For the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds. Lewis Ex. 2, pp. 99-100. Of this $655,671, $456,097 went to the public schools and $199,574 went to the nonpublic schools. Id. This

amounts to 70% of the Chapter 2 funds being allotted to the public schools and 30% being allotted to the nonpublic schools, including both private and religious schools.

Dr. Lewis stated that the LEAs are told that "for every dollar you spend for the public school student, you spend the same dollar for the non-public school student." Lewis Dep., p. 77. He declared that the Louisiana Department of Education "never transmits dollars to the non-public school." Id. at 87.

Dr. Lewis testified that any equipment bought for the nonpublic schools with Chapter 2 funds is on loan to the nonpublic schools. Id. at 99. Because the nonpublic schools do not own the equipment, the ultimate authority always rests with the public school system, not the nonpublic schools. Id. at 99-100.

In 1984, the State instituted a monitoring process to insure that the Chapter 2 books and equipment were not being used for religious purposes. Lewis Dep., pp. 102 & 142. Dr. Lewis stated that the LEAs are encouraged to get the nonpublic schools to sign a set of assurances that they won't use the equipment for religious purposes, but the nonpublic schools are not required to sign. Id. at 102-03. In addition, the LEAs make monitoring visits to the nonpublic schools, and the state makes monitoring visits to the LEAs and to some of the nonpublic schools. Id. at 103.

The United States Department of Education conducted an on-site visit to review the Louisiana Chapter 2 program on September 25-26, 1984. In their "Summary of Findings and Recommendations" as a result of their on-site assessment, the United States Department of Education stated as follows concerning "Monitoring LEAs":

> Section 564(a)(1) of the statute provides that the State agency is responsible for the administration and supervision of programs assisted under this Chapter. Congress, in enacting the technical amendments to Chapter 2, identified technical and advisory assistance and monitoring compliance as functions of an SEA's administrative and supervisory responsibilities.
>
> We understand that there are 75 LEAs and that the SEA has developed a schedule for monitoring one third of the LEAs in each of the next three years. We suggest, if at all possible, the State increase the number of visits each year. This will lessen the possibility of audit findings of noncompliance and enable the SEA to provide technical assistance to correct problems on a timely basis.

Lewis Ex. 11.

In response to the on-site assessment by the United States Department of Education, the Louisiana Department of Education made changes in monitoring the LEAs. They increased the number of on-site visits by the Chapter 2 staff to the LEAs from once every three years to once every two years. This increase in visits was to "enable more thorough, technical assistance, and the ability to correct any problems in a timely fashion." Lewis Ex. 11. In addition, in regards to private school participation in LEA Chapter 2 programs:

> the State has implemented a monitoring process that includes monitoring of the private sector. The monitoring process also includes a review of the LEA's monitoring process of the private schools. These two processes will enhance the compliance area to ensure that all equipment is used for secular, neutral, and nonideological purposes.

Lewis Ex. 11

In Louisiana, LEAs have the primary responsibility for monitoring the Chapter 2 program for compliance with federal statutory and regulatory requirements and for compliance with state guidelines.

A report entitled "Louisiana Chapter 2 Evaluation Summative Evaluation Report 1985," (Lewis Ex. 2) was written by the Bureau of Evaluation, and was submitted to Dr. Lewis in March of 1985. This report provides under the heading "Nonpublic School Participation in Chapter 2":

> Although the LEAs handle most of the administrative matters related to Chapter 2, the nonpublic schools make the decisions about how to spend their Chapter 2 allocations, and they do so independently of one another. Among Catholic parochial schools, however, some dioceses appoint coordinators to centralize planning and management efforts. This collective activity is more of a confederation than a school system.
>
> Funds used by nonpublic schools are almost entirely for non-recurring expenses, usually materials and equipment, and only occasionally are for such purposes as participating in LEA-sponsored staff development activities and securing consultants. Virtually all of the Chapter 2 funds used by nonpublic schools are expended under Subchapter B, the "school improvement" section of Chapter 2. Except that funds cannot be spent for support of religious or ideological instruction, flexibility in the use of Chapter 2 funds puts a minimum of limitations on the kinds of expenditures allowed.

Lewis Ex. 2, p. 28.

During the 1986-87 fiscal year, the total amount of Chapter 2 funds budgeted for nonpublic schools was $214,080.49, and the total amount budgeted for public schools was $447,067.45. Of the total of $214,080.49 in Chapter 2 funds budgeted for nonpublic schools, $94,758.15 was spent to provide library/media materials; $102,862.00 was spent for instructional equipment; and $16,460.34 was spent for local improvement programs.

Dan K. Lewis, who administers the Chapter 2 program for the state, was questioned extensively at his deposition about how the nonpublic schools' use of Chapter 2 instructional material and equipment was monitored. Lewis Dep. I. Dr. Lewis testified that he, along with Mr. Charles R. Jarreau and Mr. Ed Griffin, conducted a "monitoring visit" to Jefferson Parish on April 18, 1985. Lewis Ex. 6. An ECIA Chapter 2 Monitoring Form I was submitted to the Superintendent of the Jefferson Parish Public School System based on the visit by the monitors, Dr. Lewis, Mr. Jarreau, and Mr. Griffin. Id. The monitors found that "the services, materials, equipment, or other benefits provided to nonpublic schools" were not "secular, neutral and non-ideological." Id. They also commented that "in the future, caution should be taken to ensure that books and materials purchased are secular, neutral and non-ideological." Id.

Ruth Woodward, the Coordinator of the Chapter 2 program in Jefferson Parish, advised Dr. Carolyn C. Weddle, Assistant Superintendent for Instructional Programs, about the monitoring visit conducted by the Louisiana Department of Education. She explained an incident which resulted in the negative finding by Dr. Lewis and his team concerning "secular, neutral, and non-ideological" assistance provided to the nonpublic schools as follows:

> St. Rosalie's library print-out showed [that] a copy of [the book] Biography of the Saints was purchased with Chapter II funds. However, St. Rosalie contacted my office Friday to correct that entry on their library print-out. No Chapter II funds were used to purchase above, and my official response to Dr. Lewis will state same.

Lewis Ex. 11.

According to Ruth Woodward, library books are only ordered for nonpublic schools, not public schools. Woodward Dep., p. 73. The library books are stamped with "ECIA, Chapter 2." Id. at 75. After reviewing the book orders from 1982, Ms. Woodward discovered approximately 191 books were in violation of the Chapter 2 guidelines. Id. at 74. Those books were recalled and were donated to the Jefferson Parish Public Library. Id. at 75.

Ms. Woodward reviews each of the titles of the books and other materials that are received by her office from the nonpublic schools. Id. at 88. If she finds a title to be inappropriate, she deletes the title from the list and selects a title from the substitute list. Id. at 90.

In addition to library books, computers, slide and movie projectors, and overhead projectors are purchased through the program. Id. at 92. During her monitoring visits to the schools, she has "normally" found that the materials and equipment are used in accordance with Chapter 2 guidelines. Id. at 101. Ms. Woodward stated in her deposition that she normally has "a single visit" to a nonpublic school during the school year. Id. at 118.

Ms. Woodward stated that none of the Chapter 2 money is given directly to either the public or nonpublic schools in the

form of cash or a check. Id. at 207. The funds are retained and administered by her office. Id.

On March 27, 1990, the prior court granted partial summary judgment and struck down portions of the federal Chapter 2 program and the Louisiana state books and materials program authorized pursuant to La.Rev.Stat. §§ 17:351-52, as administered in Jefferson Parish, Louisiana. (Doc. 220). The use of federal funds to provide instructional equipment (including computer and audio-visual equipment), educational materials, library books, and supplies to pervasively sectarian schools under Chapter 2 was held unconstitutional and lending of such items enjoined. Id.

Attention was specifically focused on *20 U.S.C. § 7372*(a)(1)[2] which permits the furnishing of Chapter 2 materials and equipment to nonpublic schools. The "services, materials, and equipment" provided under Chapter 2 for the benefit of the nonpublic schools must be "secular, neutral, and nonideological." *20 U.S.C. § 7372*(a)(1). It was noted that "the nonpublic schools in Jefferson Parish have participated primarily in the instructional resources program whereby large quantities of instructional equipment (such as slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers, as well as library books and resource materials) are purchased with Chapter 2 funds and transferred to nonpublic school sites."

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[2] At the time of the Court's 1990 ruling, this section was codified at *20 U.S.C. § 2972*(a)(1). For ease of reference, the Court will now cite to the new United States Code sections.

The Jefferson Parish Chapter 2 program was held unconstitutional on three grounds:

> First, the primary beneficiaries of the aid are nonpublic schools; second, the majority of the schools receiving the aid are pervasively sectarian; and third, the aid has the impermissible effect of advancing religion.

Order and Reasons, (Doc. 220, p. 15).

Federal defendants and intervenors argue that the holding should be reconsidered for two main reasons. First, they claim that a major premise of the decision, i.e., that "the primary beneficiaries" of Chapter 2 "are nonpublic schools," is simply incorrect. Benefits are provided under this program for use by all schoolchildren in Jefferson Parish, both public and nonpublic, and the majority of the beneficiaries are public school children.

Second, federal defendants state that the other primary basis of the 1990 Chapter 2 Order - that the Jefferson Parish Chapter 2 program is automatically unconstitutional when Chapter 2 benefits are used at schools deemed to be "pervasively sectarian" - has been specifically and repeatedly rejected by the Supreme Court.

Federal defendants argue that the Supreme Court has never held that an educational aid program impermissibly advanced religion when the program was a neutral, general program designed to apply equally to both public and nonpublic school children, with the primary beneficiaries being public school children, as is Chapter 2. Federal defendants contend that the Supreme Court has only found improper "advancement" of religion in some of the cases when the program singled out school children in nonpublic or pervasively sectarian schools as its "primary

beneficiaries." Federal defendants maintain that the Chapter 2 program does not so single out nonpublic school children and is constitutionally valid.

Federal defendants argue that this decision was the first to invalidate any aspect or application of the nationwide Chapter 2 program, which has been in place, in its present form or in various predecessor statutes, for nearly 30 years. In an opinion issued after the 1990 Chapter 2 Order, the Ninth Circuit Court of Appeals addressed the constitutionality of Chapter 2, and upheld the Chapter 2 program. *Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995)*, reh'g and reh'g en banc denied, *62 F.3d 300 (9th Cir. 1995)*. No petition for certiorari was filed in Walker.

The Walker court noted that "approximately seventy-four percent of the Chapter 2 benefits went to public schools and twenty-six percent went to private schools." *46 F.3d at 1464*.

Federal defendants and intervenors claim that the Walker court's analysis is consistent with the prior court's analysis in its post-trial opinion, in which it found that public school students are the primary beneficiaries of funding under Chapter 1. Federal defendants and intervenors argue that the post-trial analysis on this issue is correct and should be applied to Chapter 2.

Federal defendants and intervenors claim that in its post-trial opinion, the previous court rejected Establishment Clause challenges to Chapter 1 and the school bus transportation program, on the grounds that the primary beneficiaries of those programs are not nonpublic schools. Rather the "primary beneficiaries" are either students at public schools, who constitute the majority of students receiving Chapter 1 benefits, or all school children or their

parents who receive the benefits of the school bus transportation program. Federal defendants and intervenors argue that the federal Chapter 2 program, as well as the state school books and materials program, are also neutral, general benefit programs, and so the earlier ruling on Chapter 2 should be vacated.

Plaintiffs oppose the motions of federal defendants and intervenors and cite to the relevant Supreme Court cases.

In *Meek v. Pittenger, 421 U.S. 349, 364, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975),* the Supreme Court invalidated a materials and equipment program which was specifically and intentionally directed only to nonpublic schools, the majority of which were found to be religious.

In *Wolman v. Walter, 433 U.S. 229, 248-51, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977),* the Supreme Court invalidated a program authorizing the loan of instructional equipment and materials to the parents of nonpublic school students only.

In *Mueller v. Allen, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983),* the Supreme Court upheld a Minnesota statute that allowed a tax deduction for all state taxpayers, including parents of children attending religiously-affiliated private schools, for education-related expenses such as tuition, textbooks, and transportation.

However, in Mueller, the Court found significant the fact that the "public funds . . . become available only as a result of numerous private choices of individual parents of school-aged children." *Id. at 399.*

In *Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986),* the Supreme Court held that provision of aid under a state

vocational rehabilitation program to a student attending a private Christian college for the purpose of pursuing a religiously-based career would not, in violation of the Establishment Clause, have the primary effect of advancing religion.

Plaintiffs point out that in Witters it was the individual blind student who made the decision completely independent from any sectarian institution with regard to where his grant money would be spent. The sectarian institution, therefore, had no part in the planning of the program or the decision concerning who would receive the benefit. The Court in Witters noted that "the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the state," citing *School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985).*

The primary argument of the federal defendants is that aid to nonpublic schools in the form of loans of educational equipment, such as computers, overhead projectors, videos, duplicating machines, and the like, is constitutional as long as the authorizing legislation provides for such loans and grants to both public and nonpublic schools. According to defendants, the constitutionality of such a program is dependent on a single factor - the breadth of the class of recipients.

Plaintiffs rely on *Bowen v. Kendrick, 487 U.S. 589, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988),* in which the Court observed that "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Id. at 609.* The Court stated that "one way in which direct government aid might have that effect is if the aid

flows to institutions that are 'pervasively sectarian.'" *Id. at 610.* The Court, however, concluded that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." Id. The Court did not suggest all or most, but only a "significant proportion" need flow to pervasively sectarian institutions for the program to be constitutionally flawed.

Plaintiffs contend that Chapter 2 is unconstitutional as applied in Jefferson Parish for two main reasons: 1) Much of the Chapter 2 equipment and materials provided to sectarian schools in Louisiana is easily divertible to religious activities; and 2) Like the Ohio statute in Wolman, it provides equipment directly for the sectarian schools, not the individuals.

Plaintiffs contend that Wolman "trashed" the argument that Meek and Wolman stand for the proposition that gifts magically take on a constitutional character if a single neutral statutory provision includes both public and nonpublic elementary and secondary schools as recipients.

Both defendants and plaintiffs rely on *Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993).* In Zobrest, the Supreme Court held that the Establishment Clause did not prohibit a public school district from providing a sign language interpreter at state expense in a Catholic school. The Court noted that "disabled children, not sectarian schools, are the primary beneficiaries" of the program. *Id. at 12, 113 S. Ct. at 2469.*

The Zobrest Court noted that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge

just because sectarian institutions may also receive an attenuated financial benefit." *Id. at 8, 113 S. Ct. at 2466.*

The Zobrest court made a sharp distinction between direct and indirect aid to pervasively sectarian institutions. The Court found that the aid provided to James Zobrest was indirect, as distinguished from the direct subsidy through the providing of teaching material and equipment in Meek and the providing of teachers and instructional equipment and materials in Ball. *Id. at 12, 113 S. Ct. at 2468-69.*

The Zobrest Court quoted from Witters and Ball: "The State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id. at 12, 113 S. Ct. at 2468.*

Plaintiffs argue that to determine whether the program of furnishing instructional equipment, materials, and supplies to parochial schools in Jefferson Parish more closely resembles the programs struck down in Meek and Ball or the programs upheld in Mueller and Witters, this Court needs to determine the substantive impact of the aid, that is, whether the aid is truly to the individual student or rather directly to the school. If the aid is truly to the individual student, plaintiffs argue that the aid should be upheld. However, if the aid is directly to the nonpublic school, then the aid should be ruled unconstitutional.

Federal defendants contend that the rulings on the Chapter 2 summary judgment motion and the Chapter 1 post-trial findings and conclusions have not been consistent. Federal defendants state that there is no difference between the Chapter 1 and the Chapter 2 programs as to who are the primary beneficiaries. Thus, federal defendants argue that

since Chapter 1 was found constitutional on its face, then Chapter 2 should also be upheld.

Plaintiffs disagree and argue that the rulings have been consistent. The Chapter 2 program struck down by the previous court concerned "nonpublic schools receiving an allotment [of funds] which allows them to order instructional materials and equipment, including library books." (Doc. 220, p. 4). Thus plaintiffs contend that it was found that the aid flowed directly to the nonpublic schools.

The ruling as to the Chapter 1 capital expense statute related to "funds to pay the costs of maintaining Chapter 1 services off of the premises of parochial schools at 'neutral sites.'" (Doc. 337, p. 142). The decision provides that "under § 2727(d)(A), the Secretary distributes the appropriate [Chapter 1 capital expense] funds to each state according to a statutory formula. Local Educational Agencies (LEAs) apply to the State Educational Agencies (SEAs) to receive the funds, and the SEAs distribute the funds to LEAs on the basis of need, according to criteria the SEAs have established." Id. at 144.

Plaintiffs contend that there is no conflict between the summary judgment ruling on Chapter 2 and the post-trial findings and conclusions regarding the Chapter 1 capital expense provision. Plaintiffs argue that the decision concluded that Chapter 2 directly benefited pervasively sectarian schools, while under the Chapter 1 capital expense statute, no tax-derived funds ever reached nonpublic schools. Chapter 1 only benefited students who received remedial services rendered by public employees outside of parochial school facilities.

In fact, plaintiffs maintain that the findings and conclusions suggested that the Chapter 1 capital expense

statute had only the indirect effect of aiding sectarian schools and concluded "that [this] indirect effect does not render the government aid [provided by Chapter 1] unconstitutional." (Doc. 337, p. 154).

Plaintiffs argue that *Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (9th Cir. 1995)*, which ruled that Chapter 2 is constitutional, is distinguishable from the instant case. Plaintiffs state that there are significant differences in the Chapter 2 program as administered in Jefferson Parish and the Chapter 2 program administered in the San Francisco Unified School District.

Plaintiffs contend that the items provided in Louisiana under the Chapter 2 program are easily diverted to religious purposes. The items provided in Louisiana include maps, globes, laboratory equipment, tape recorders, projectors, and other audio-visual equipment. In San Francisco, the Chapter 2 materials were confined to prescreened textbooks, instructional materials, and "locked" computer hardware and software that could not be diverted to religious use.

Plaintiffs submit that because the instructional equipment and materials are so easily divertible, there is basically no constitutionally permissible monitoring scheme available to prevent constitutional violations. Plaintiffs argue that the evidence in this case demonstrates that audio-visual equipment, such as overhead projectors, VCRs, etc., which are usable equally in religion and science classes and are thus easily divertible, cannot be effectively monitored. In the case of Jefferson Parish, unlike Walker, plaintiffs claim that the evidence shows that such equipment has actually been used in classes teaching religion. Thus, plaintiffs state that the effectiveness of any so-called monitoring conducted by the officials charged with such responsibilities has proven to be ineffective.

The prior court observed in its March 27, 1990 Order that the program found unconstitutional in Meek involved just under $12 million of direct aid to predominantly church-related nonpublic schools in Pennsylvania through the loan of instructional materials and equipment. It concluded that this amounted to approximately $9,090 per school and that the Meek court firmly determined that this aid was "neither indirect nor incidental." (Doc. 220, p. 13). The evidence in this case indicates that for fiscal year 1985, a total of $207,648 was allocated under Chapter 2 for the 41 participating nonpublic schools in Jefferson Parish. This comes to $5,064 for each participating school. In addition, another $649,344 was allocated to the 56 participating nonpublic schools in Jefferson Parish under the state program providing free books, materials, and supplies. This comes to another $11,595 per participating school. Plaintiffs maintain that the Chapter 2 program administered in Jefferson Parish involves a significant number of pervasively sectarian schools and provides substantial direct aid to pervasively sectarian elementary and secondary schools and thus is violative of the Establishment Clause.

In its 1990 Chapter 2 Order, the prior court focused on the Chapter 2 program and did not undertake a detailed analysis of the Louisiana statutes, La.Rev.Stat.Ann. §§ 17:351-352, which authorize the provision of school books and instructional materials to students at public and nonpublic schools, or the implementation of that program in Jefferson Parish. Plaintiffs have not challenged the provision of textbooks pursuant to the statute. An overwhelming portion of the funds are used to purchase textbooks.

Intervenors note that library reference books purchased pursuant to La.Rev.Stat.Ann. § 17:351 are ordered from lists approved by the Louisiana Board of Elementary and Secondary Education. Fine deposition at 186 and Ex. 57.

Books and instructional materials may only be ordered from state-approved lists and sources. Fine deposition at 129 and Ex. 25. Intervenors argue that these safeguards are more than adequate to assure that the funds are not used for religious purposes.

In June of 1995, the United States Supreme Court most recently examined the Establishment Clause in *Rosenberger v. Rector & Visitors of Univ. of Va., U.S. , 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).* In Rosenberger, the University of Virginia withheld authorization for payments from its Student Activities Fund to cover the printing costs of a religious newspaper issued by a student group. The University found that the student newspaper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality," as prohibited by the University's guidelines. *Id. at 2513.* The Supreme Court found no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause. *Id. at 2525.*

The Rosenberger court stated "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id. at 2521.* The Supreme Court found that the Student Activities Fund (SAF) was neutral toward religion and that there was no suggestion that the SAF had been created to advance religion or to aid a religious cause. *Id. at 2522.*

The Rosenberger Court reaffirmed the principle that there are "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions . . . ." *Id. at 2523.* The Supreme Court was careful to point out the following:

> We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.

Id.

Before Rosenberger was decided, in January 1995, the Ninth Circuit Court of Appeals addressed the constitutionality of Chapter 2 in Walker. The Ninth Circuit Court of Appeals held "that under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." *46 F.3d at 1465.* In Walker, the San Francisco Unified School District (the District) received the Chapter 2 funds from the State and then the District directly purchased the materials for the private schools. *Id. at 1464.* Title to all of the materials and equipment purchased remained with the District. Id. There were no funds directly provided to the private schools. Id. The materials and equipment purchased for the private schools included "library books, textbooks, videos, overhead projectors, movie and slide projectors and projection stands, television sets, record players, cassette recorders, VCR's, video cameras, 'listening centers,' globes and maps, microscopes and other lab equipment, computer equipment, musical equipment, stereo systems, and desks and tables." Id.

The Walker court applied the three part test set forth in *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1976).* The three part Lemon test requires that for a state aid program to be constitutional, 1) it must have a secular legislative purpose; 2) it must not have as its

principal or primary effect the advancement or inhibition of religion; and 3) it must not foster excessive government entanglement with religion. *46 F.3d at 1455.* In Walker, the Ninth Circuit found that Chapter 2 funding passes all three prongs of the *Lemon test. 46 F.3d at 1469.*

The Walker court found that "the purpose of Chapter 2 is to improve resources available to schools to increase the quality of education." *Id. at 1464.* This was found to be a valid secular purpose.

As to the second prong, the Ninth Circuit held that "under Chapter 2, the loaning of neutral, secular equipment and instructional materials to parochial schools does not have the primary or principal effect of advancing religion." *Id. at 1465.* The Walker court chose not to rely on Meek and Wolman which had struck down programs which loaned neutral and secular instructional materials and equipment to parochial schools. Rather the court in Walker relied on recent Supreme Court cases which have focused on government neutrality toward religion. *Id. at 1466.*

The Walker court stated:

> Government neutrality becomes suspect when, in practical effect, the governmental aid is targeted at or disproportionately benefits religious institutions, or when, in symbolic effect, the governmental aid creates a symbolic union between church and state. We therefore must analyze (1) whether the Chapter 2 benefit at issue is a general welfare benefit neutrally available to a broad class of people without reference to religion, *Zobrest, 509 U.S. at 5, 113 S. Ct. at 2466,* and (2) whether the benefit, even though generally available, creates a symbolic union of church and state. *Ball, 473 U.S. at 389, 105 S. Ct. at 3226.*

46 F.3d at 1467.

Applying the first part of the test, the Walker court found that Chapter 2 benefits are neutrally available without reference to religion. Id. The court found that 74% of the benefits went to public schools with the remaining 26% divided between nonreligious and religious private schools. Id. Thus the court held that "the overwhelming percentage of beneficiaries are nonparochial schools and their students." Id.

In addition, the court found that controls were in place to prevent Chapter 2 benefits from being "diverted" to religious instruction, such as, (a) prescreening the textbooks and other materials; (b) title to the books and materials remains in the public agency; (c) parochial schools pledge not to use the Chapter 2 materials for religious purposes; (d) the School District made yearly monitoring visits; and (e) all Chapter 2 services must be provided by persons independent of the private school and of any religious organizations. Id.

As to the second part of the test, the Walker court found that the loaning of instructional materials and equipment to parochial schools pursuant to Chapter 2 did not create a symbolic union between church and state. Applying Zobrest, the court found that if having a public employee present in a parochial school classroom does not create a symbolic union between church and state, then providing religiously neutral instructional materials and equipment to parochial schools does not create a symbolic union either. *46 F.3d at 1468.*

The Walker court distinguished the statutes struck down in Meek and Wolman from Chapter 2, finding that the statutes in Meek and Wolman were not neutral. In Meek and Wolman, most of the aid was targeted at private schools, the majority of which were church-related. *46 F.3d at 1468.* In Walker, 74% of the Chapter 2 benefits went to public

schools, and of the remaining 26%, less than 70% of the 26% went to religious private schools. Id. Thus the court found that "Chapter 2 is a neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." Id. Thus Chapter 2 was found not to have as its principal or primary effect the advancement or inhibition of religion. *Id. at 1469.*

Finally, the Walker court analyzed whether all of the controls in place to prevent Chapter 2 benefits from being diverted to religious instruction resulted in excessive entanglement between church and state. *46 F.3d at 1469.* The court noted that the Supreme Court in Zobrest did not even mention the third prong of Lemon when it allowed an interpreter to be present in a pervasively sectarian parochial school classroom. Id. Since the Zobrest Court did not find excessive governmental entanglement, the Walker court followed the lead in Zobrest and found that the Chapter 2 controls did not result in excessive entanglement between church and state. Id.

Based on Rosenberger and Walker, this Court finds that the Chapter 2 funding passes all three prongs of the Lemon test. It is clear that the neither the state nor the federal government makes any direct money payments to the nonpublic schools, which was the "special Establishment Clause danger[]" set forth in *Rosenberger. 115 S. Ct. at 2523.* No public funds were received by the nonpublic schools in Jefferson Parish.

Applying the first prong of the Lemon test, as the court found in Walker, Chapter 2 passes the first part of the Lemon test. Increasing the quality of education is clearly a valid secular purpose. *46 F.3d at 1464.*

As to the second prong, this Court will follow the finding of the Ninth Circuit that the loaning of neutral, secular equipment and instructional materials to parochial schools pursuant to Chapter 2 does not have the primary or principal effect of advancing religion. *Id. at 1465.* The facts in the instant case are virtually indistinguishable from those present in Walker.

This Court finds that Chapter 2 benefits are neutrally available without reference to religion. Between 70 and 75% of Chapter 2 benefits are allocated to public schools each year, and between 25 and 30% are allocated to the nonpublic schools, including both private and religious schools. Thus as in Walker, it is clear that the overwhelming percentage of Chapter 2 benefits is provided to the public schools.

In addition, all of the monitoring controls in effect in Walker are present in this case. The library books and other instructional equipment are prescreened and title remains with the public agency. Most parochial schools sign a pledge agreeing not to use the Chapter 2 materials for religious purposes and the Chapter 2 coordinator makes yearly monitoring visits to the nonpublic schools. In addition, the State makes monitoring visits every two years to the nonpublic schools. Finally, employees of a public agency provide the Chapter 2 services and no money is directly paid to the parochial schools. The Court follows Walker and finds that these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction.

This Court will also follow the holding of Walker that the loaning of instructional materials and equipment to parochial schools pursuant to Chapter 2 did not create a symbolic union between church and state. For all of these reasons, this Court finds that Chapter 2 does not have as its principal or primary effect the advancement or inhibition of religion.

Finally this Court finds that the controls in place to prevent Chapter 2 benefits from being diverted to religious use did not result in excessive entanglement between church and state, relying on Walker and Zobrest. Thus Chapter 2 complies with the third prong of Lemon.

Based on the Ninth Circuit's 1995 decision in Walker and recent United States Supreme Court decisions, in particular, Zobrest and Rosenberger, this Court will now set aside the prior court's March 27, 1990 ruling. This Court finds that Chapter 2, now known as Subchapter VI of the Improving America's Schools Act of 1994, *20 U.S.C. §§ 7301*-7373, and the Louisiana Equipment and Materials Statute, La.Rev.Stat. §§ 17:351-54, do not violate the Establishment Clause, facially and/or as applied in Jefferson Parish, Louisiana. This Court will vacate the Order and Reasons of March 27, 1990, and deny plaintiffs' motion for partial summary judgment on Chapter 2 and the Louisiana Equipment and Materials Statute and will grant the motions of the federal defendants, the state defendants, and the intervenors for summary judgment on Chapter 2 and the Louisiana Equipment and Materials Statute.

Motion of plaintiffs to alter or amend the judgment on the school bus transportation program

La. Rev. Stat. 17:158 requires that each parish or school board provide free transportation for any student attending a school within its jurisdictional boundaries if the student resides more than one mile from the school, and allows that parish or school board to contract out the transportation services. The statute applies to all eligible public and non-public school students.

The JPPS provided transportation to over 41,000 students by school bus in 1988-1989 (coinciding with the trial), of

which 85.6 % were public school students, 12.4 % were Catholic in-district school students, and 1.4 % were Catholic out-of-district students, and .5 % were Lutheran school students. Catholic out-of-district students are Catholic school students who attend Catholic school at schools which are not within their church parishes, sometimes because their church parishes do not have schools.

The Supreme Court has held that the Establishment Clause of the First Amendment does not prohibit the state from paying for the transportation of schools children to parochial as well as public schools, so long has the school has no control over the expenditure of the fund and the effect of the expenditure is unrelated to the content of the education provided. *Wolman v. Walter, 433 U.S. 229, 253, 97 S. Ct. 2593, 2608, 53 L. Ed. 2d 714 (1977).* The provision of such transportation to the parochial school student is constitutional if the school does not determine how often the child is transported, i.e., the child must make one-round trip to and from school every day and the travel is unrelated to any aspect of the curriculum. *Wolman, 433 U.S. at 253, 97 S. Ct. at 2608.*

At issue in this particular motion is the decision of Judge Heebe that it is constitutional for the JPPS and the State of Louisiana to provide funds to the Jefferson Parish Nonpublic School Transportation Corporation for the purpose of contracting bus services to students who attend non-public schools in JP, but that it is unconstitutional to send the money directly to the schools, i.e., Westbank Cathedral Academy and Faith Lutheran School, because there is no limitation on the way those schools could use the money.

The Jefferson Parish Nonpublic School Transportation Corporation ("the corporation") is a corporation established by parents of children who attend nonpublic schools. The

purpose of the corporation was to provide transportation to these children to and from school. The reason the corporation was established was that there was a significant funding cut to the JPPS for transportation in the 1988-1989 school year, and thus no funds were allocated for transportation services to children attending non-public schools outside of their district. The JPPS hired bus drivers and set up bus routes for both public school children and non-public school children attending school in their districts.

After the routes were set, more funds were allocated to provide transportation to non-public school children attending school outside of their districts. In order to obtain the transportation, the corporation, which is non-religious and was set up exclusively to hire bus drivers to drive these children to and from school, was created and contracted with the JPPS to provide purely secular transportation services. JPPS also contracted directly with two religious schools to provide their own transportation services and paid them directly.

Judge Heebe found that providing funding to the private corporation to supply purely secular transportation services to nonpublic school students was not unconstitutional in design, or in practice, except that sending the funding directly to two pervasively sectarian schools, i.e., Westbank Cathedral Academy and Faith Lutheran School, was unconstitutional as it was direct money to the schools which they could divert to religious purposes.

The plaintiffs disagree with this holding, but the decisions of *Rosenberger, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995),* and *Walker, 46 F.3d 1449 (9th Cir. 1995)* both support it. As previously noted in the Chapter 2 discussion, Rosenberger holds that there are "special Establishment Clause dangers where the government makes direct money payments to

sectarian institutions," but that when the services or funds supplied are neutral, routine, and secular, then any benefit to religion is incidental to the government's provision of the services and does not offend the *Constitution. 115 S. Ct. at 2523-2524.* Judge Heebe found that the funds were used by the corporation solely for transportation services, which is a secular, neutral, and routine service, and that a variety of schools with children of all different religions use the transportation services.

Upon review of the entire matter, Judge Heebe's decision should be upheld and thus, the plaintiffs' motion to alter or amend the judgment on the school bus transportation program should be denied.[3]

Motion of state defendants for leave of court to adopt amendment to the regulations governing reimbursement for required services

In the judgment entered on July 25, 1994, Judge Heebe enjoined further administration of the Reimbursement of Required Costs Program "until such time as it has been satisfactorily demonstrated to this Court that the Louisiana Superintendent of Education and the Board of Elementary and Secondary Education (BESE) will properly administer the reimbursement program as prescribed by La. Rev. Stat. 17:361-365." In 1996, BESE adopted a motion to amend the regulations governing the program to allow for alternative documentation for missing time sheets for the school years 1993-94, 1994-95, and 1995-96 only. In exchange for allowing alternative documentation, which BESE determined to be necessary due to the past laxity in the administration of

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[3] This Court is somewhat troubled by the apparent lack of monitoring of the corporation's use of the funds, but considering the limited nature of the corporation's functions, does not find the program unconstitutional.

the program; only 70 % of the claimed amount would be considered for payment.

The plaintiffs oppose the motion because the statute requires that actual time records be kept and that estimates or "parameters" were not sufficient documentation for payment. They further note that unless "actual cost" to the school is used as a basis for determining what funds are due, there is the possibility that the nonpublic schools can greatly inflate the claim. By way of example, one school which requested 705 hours for performing a particular service for the 1984-1985 school year sought reimbursement for 3,860 hours for performing the same service for the 1992-1993 school year.

Apparently, there are only 5 schools which will be affected by the change in the regulations and only three school years are included. The nature of the relief requested is minimal and the schools' requests will, at a minimum, be subject to a 30 % reduction. At the present time, payment of funds under the Required Services Reimbursement program is enjoined due the inadequacy of the auditing procedure. Considering the totality of the circumstances, the Court finds that the request is reasonable and does not infringe on the plaintiff's constitutional rights and thus will provide this limited relief to the state defendants.

Accordingly,

IT IS ORDERED that the Motion of the Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Reconsideration of this Court's Ruling on the Chapter 2 Program as Administered in Jefferson Parish, Louisiana, be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Reconsideration of the Court's March 1990 Summary Judgment Order on the Chapter 2 Program and the Louisiana State School Books and Materials Program, as Applied in Jefferson Parish, Louisiana (Doc. 367), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Order and Reasons entered on March 27, 1990 (Doc. 220), be, and the same is hereby VACATED, except to the extent that such Order and Reasons found that those nonpublic schools in Jefferson Parish, Louisiana, which are operated under the auspices of the Archdiocese of New Orleans, are "pervasively sectarian." (Doc. 220, p. 11)

IT IS FURTHER ORDERED that the Motion of Plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, for Partial Summary Judgment on the Chapter 2 Program and the Louisiana State School Books and Materials Program (Doc. 165), be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the Cross-Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Summary Judgment on Plaintiffs' Chapter 2 claims (Doc. 178), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Cross-Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, for Summary Judgment on

Chapter 2 (Doc. 180), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for partial summary judgment on Chapter 2 and the Louisiana State School Books and Materials Program (Doc. 166), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Alter or Amend this Court's Judgment of July 25, 1994, in which this Court declared unconstitutional and enjoined portions of the federal Chapter 2 program as administered in Jefferson Parish, Louisiana (Doc. 379), be, and the same is hereby

GRANTED.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, to Alter or Amend the Court's Judgment of July 25, 1994, with respect to Chapter 2 and the Louisiana state books and materials program (Doc. 380), be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the Motion of Federal Defendants, Richard W. Riley as Secretary of the United States Department of Education, and the United States Department of Education, to Stay the Judgment Entered by this Court on July 25, 1994 (Doc. 381), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, to Partially Stay the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program in Jefferson Parish (Doc. 384), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Amended Motion of State Defendants, Cecil J. Picard as Louisiana Superintendent of Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education, for Partial Stay of the Judgment Entered on July 25, 1994, with respect to the unconstitutionality of the Chapter 2 program and La.R.S. 17:351-52 in Jefferson Parish (Doc. 392), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of Intervenors, Guy Mitchell, Jan Mitchell, Earline Castillon, Eugene Cerise, and Kathy Cerise, for Partial Stay of the Implementation of the Court's July 25, 1994 Judgment with Respect to Chapter 2, the Louisiana State Books and Materials Program (Doc. 394), be, and the same is hereby MOOT.

IT IS FURTHER ORDERED that the Motion of Plaintiffs Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, to Alter or Amend the Judgment regarding the School Bus Transportation Program (Doc. 388) be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the Motion of the State Defendants, Cecil J. Picard as Louisiana Superintendent of

Public Instruction, Kenneth Duncan as Louisiana State Treasurer, and the Louisiana State Board of Elementary and Secondary Education (Doc. 455) for Leave of Court to Adopt Amendments to the Regulations Governing Reimbursement for Required Services be, and the same is hereby GRANTED.

New Orleans, Louisiana, this 28 day of January, 1997.

MARCEL LIVAUDAIS, JR.

UNITED STATES DISTRICT JUDGE

AMENDED JUDGMENT

Considering the record, this Court's ruling on the motions of intervenors and the state defendants to lift the injunction, the Order and Reasons entered this date on all outstanding motions, and the law, the Final Judgment entered by Judge Frederick J.R. Heebe on July 25, 1994 (Doc. No. 374) is hereby AMENDED in the following respects:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Education; Jefferson Parish School Board (JPSB); Elton Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of

the Jefferson Parish School Board; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; DECLARING that the provision of instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools in Jefferson Parish, Louisiana under Chapter 2 of the Education Consolidation and Improvement Act of 1981, *20 U.S.C. §§ 2911*-76, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana state legislature, is constitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED,

ADJUDGED AND DECREED that the permanent injunction previously entered against defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Elton Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of the Jefferson Parish School Board enjoining them from furnishing instructional equipment (including

computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981, *20 U.S.C. §§ 2911-76*, or as reauthorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as reauthorized by the Louisiana legislature, be and is hereby LIFTED AND VACATED.

In all other respects, the Judgment remains as entered.

New Orleans, Louisiana, this 28 day of January, 1997.

MARCEL LIVAUDAIS, JR.

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 85-5533 SECTION "B"

MARY L. HELMS, individually and as next friend of
AMY T. HELMS, a minor; et al.,
PLAINTIFFS

v.

WILMER CODY, as Louisiana State
Superintendent of Instruction; et al.,
DEFENDANTS;

GUY MITCHELL, et al.,
INTERVENORS

June 10, 1994, Filed, Entered

OPINION

The plaintiffs in this action are Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol. They reside within the Jefferson Parish School District and within Jefferson Parish, Louisiana.

The defendants currently remaining in this case are:

a) Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction;[1]

b) Mary Landrieu as Louisiana State Treasurer;

c) Richard W. Riley[2] as Secretary of the United States Department of Education;

d) United States Department of Education;

e) Louisiana State Board of Elementary and Secondary Education (BESE);

f) Jefferson Parish School Board (JPSB);

g) Barbara Turner[3] as Superintendent of the Jefferson Parish Public School System;

h) Martin Marino[4] as President and member of the Jefferson Parish School Board;

i) Polly Thomas[5] as Vice President and member of the Jefferson Parish School Board;

j) Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board;[6] and

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[1] At the time of the trial, the Louisiana Superintendent of Public Instruction was Wilmer Cody.

[2] When originally filed, this case named William Bennett as Secretary of the United States Department of Education.

[3] At the time of trial, Russell Protti was the Superintendent of the Jefferson Parish Public School System.

[4] At the time of trial, Henry Hoppe was the President and a member of the Jefferson Parish School Board.

[5] At the time of trial, Nick Giambelluca was the Vice President and a member of the Jefferson Parish School Board.

k) the Special Educational Services Corporation.

The intervenors in this action are Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch.

Plaintiffs have challenged federal statutes, as well as Louisiana state programs, on their face and/or as administered and applied in Jefferson Parish, on the grounds that they violate the Establishment Clause of the First Amendment and the Fifth and Fourteenth Amendments. Presently before the Court are the following claims:

1. That the special education programs providing special education services through the use of public school employees on the premises of sectarian schools in Jefferson Parish, Louisiana are unconstitutional.

2. That Louisiana statutory provisions authorizing the funding of special education programs on the premises of pervasively sectarian institutions are unconstitutional on their face, and as implemented and applied.

3. That Louisiana's legislatively-adopted program for the provision of reimbursement to nonpublic schools for administrative expenses is unconstitutional.

4. That the transportation program which provides for separate transportation of public and nonpublic school children in Jefferson Parish is unconstitutional in its application.

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[6] Elton Lagasse, Robert Wolfe, Barry Bordelon, Robert Autin, Donald Jones, Martin Marino, and Dewey Spies were all members of the Jefferson Parish School Board at the time of the trial.

5. That the transportation program results in excessive entanglement.

6. That the state statute authorizing a flat-rate reimbursement to parents transporting their children to school is unconstitutional on its face and as previously administered and applied.

7. That the capital expense provision of Chapter 1 of the Education Consolidation and Improvement Act of 1981 is unconstitutional on its face.

This matter came on for trial on a previous date. This Court, having heard the testimony at trial and having considered the record, the evidence, the transcript, the applicable law, and the excellent memoranda submitted by the parties, now makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), as hereafter set forth.

FINDINGS OF FACT

1. Plaintiff, Mary L. Helms, is the mother of Amy T. Helms who at the time of trial was an eleventh grade student at Bonnabel High School, which is located in Jefferson Parish and is operated by the Jefferson Parish Public School System.

2. Plaintiff, Esperanza Tizol, is the mother of Herman Tizol and Alia Tizol who at the time of trial were enrolled at Congetta Trippe Janet Elementary School, which is located in Jefferson Parish and is operated by the Jefferson Parish Public School System.

3. Plaintiff, Marie Louise Schneider, has no children enrolled in the Jefferson Parish Public School System. She

represents Chapter 1 parents in Jefferson Parish as the "parental advisory counsel parishwide chairperson." Doc. 260, p. 7.

4. Each of the plaintiffs is a United States citizen and citizen of the State of Louisiana, and pays either excise taxes or income taxes to the United States. Doc. 219, p. 3.

5. This Court has already found that each of the plaintiffs pays sales and other taxes to the State of Louisiana and each plaintiff pays local sales tax which ultimately benefits the Jefferson Parish Public School System. Doc. 219, p. 3. Therefore, this Court finds that the plaintiffs have standing to challenge the various state programs at issue in this case.

6. Plaintiffs also have standing to challenge the facial validity of the "capital expenditures" provision of Chapter 1 of the Elementary and Secondary Education Act of 1965, as amended, *20 U.S.C. § 2727*(d). Doc. 219.

I. SPECIAL EDUCATION

A. WHETHER THE SPECIAL EDUCATION PROGRAMS PROVIDING SPECIAL EDUCATION SERVICES THROUGH THE USE OF PUBLIC SCHOOL EMPLOYEES ON THE PREMISES OF SECTARIAN SCHOOLS IN LOUISIANA, INCLUDING JEFFERSON PARISH, ARE UNCONSTITUTIONAL.

B. WHETHER LOUISIANA STATUTORY PROVISIONS AUTHORIZING THE FUNDING OF SPECIAL EDUCATION PROGRAMS ON THE PREMISES OF PERVASIVELY SECTARIAN INSTITUTIONS ARE UNCONSTITUTIONAL ON THEIR FACE, AS WELL AS IMPLEMENTED AND APPLIED.

FINDINGS OF FACT

1. Plaintiffs claim that the state's special education program, that being La. Rev. Stat. §§ 17:1941-1956, as it is being administered and applied, is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

2. Plaintiffs also make a facial challenge to the special education statutes, contending that they authorize the expenditure of tax-derived funds for the payment of the salaries and expenses of teachers and staff at pervasively sectarian institutions where the employees of those institutions, other than public school employees, provide special education services.

3. La. Rev. Stat. § 17:1941 provides that it is the duty of the state, city and parish public school systems of the state of Louisiana "to provide an appropriate, free, publicly supported education to every exceptional child who is a resident therein." La. Rev. Stat. Ann. § 17:1941 (West 1982).

4. The stated legislative purpose of the Louisiana special education statute is:

> to provide for a flexible and uniform system of special education for all children requiring such programs and related services; to provide a flexible and nondiscriminatory system for identifying and evaluating the individual needs of the child; to determine the appropriateness of the special education program; to conduct a periodic evaluation of the program and its benefit to the child; to prevent denials of equal educational opportunities on the basis of national origin, sex, economic status, race, religion, and physical or mental handicap or other exceptionalities in the

> provision of appropriate, free publicly supported education; and to provide such special education programs herein described and related services in the least restrictive alternative education settings.

La. Rev. Stat. Ann. § 17:1941.

5. La. Rev. Stat. § 17:1943(2) defines an exceptional child as one who is "mentally disabled, gifted and talented, hard of hearing, deaf, speech impaired, severe language disordered, visually impaired, emotionally disturbed, orthopedically impaired, hospital/homebound, other health impaired, learning disabled, which includes attention deficit disordered and dyslexia, traumatic brain injured, or autistic, and as a result may require special education or related services." La. Rev. Stat. Ann. § 17:1943(2) (West Supp. 1994).

6. In Louisiana, special education is "any program of instruction within the preschool, elementary, and secondary school structures of the state, specifically designed to provide for different learning styles of exceptional children." La. Rev. Stat. Ann. § 17:1943(4) (West Supp. 1994).

7. Section 17:1944(A)(1) provides that the special educational services are to "be administered at the state level by the Department of Education, with the approval of its governing authority, and on the city or parish level by parish or city school boards." La. Rev. Stat. Ann. § 17:1944(A)(1) (West Supp. 1994). Section 17:1944(A)(2) provides that the office of special education services within the Department of Education "shall provide general supervision and monitoring of all education programs for exceptional children conducted within the state, including all such education programs administered by other state or local agencies." La. Rev. Stat. Ann. § 17:1944(A)(2) (West Supp. 1994).

8. La. Rev. Stat. § 17:1944(13) authorizes the Department of Education "to conduct or contract with any federal, state, city, parish, or private agency, research and development projects designed to improve the quality of special education programs or to increase the efficiency of such programs." La. Rev. Stat. Ann. § 17:1944(13) (West 1982).

9. Under La. Rev. Stat. § 17:1946(A), the Department of Education must approve alternative education settings in which special education programs are to be conducted, including nonpublic day school facilities and private residential schools. La. Rev. Stat. Ann. § 17:1946(A) (West Supp. 1994).

10. La. Rev. Stat. § 17:1946(C) and (D) allows a public educational agency to place an exceptional child in an approved special nonpublic day school program as an alternative education setting. La. Rev. Stat. Ann. § 17:1946(C), (D) (West 1982). Subsection (C) states that any exceptional child,

> who has been placed prior to or during the 1978-1979 school year by a public education agency in an approved special nonpublic day school as an alternative education setting because public facilities and programs were not available and who has received special education and related services in an approved special nonpublic day school during the 1978-1979 school year, shall not be transferred by the public education agency without formal parental approval.

Id.

11. The parties stipulated concerning special education tri-party agreements entered into between the Louisiana State Department of Education and certain approved nonpublic

schools pursuant to La. Rev. Stat. § 17:1946(C). Ex. S-35. The stipulation reads:

> The Louisiana State Department of Education, by and on behalf of certain local education agencies, has entered into tri-party agreements with some approved nonpublic schools under the authority of LA. REV. STAT. ANN. 17:1946(C) for the provision of special educational services and where necessary related services as specified in an Individualized Education Program for certain handicapped children within the jurisdiction of the local education agency. Plaintiffs' Exhibit No. 239, annexed hereto as Attachment A, is an example of such a tri-party agreement between De La Salle Special Education School, and the Louisiana State Department of Education by and on behalf of the Jefferson Parish School Board for the provision of special education services to one handicapped child placed by a public agency prior to the 1978-79 school year.
>
> Each of said children listed in those tri-party agreements executed pursuant to LA. REV. STAT. ANN. 17:1946(c) has been identified as a handicapped child who is between the ages of three (3) and twenty-one (21), and who was placed by a public agency in an approved nonpublic school prior to the 1978-79 school year because the local educational agency did not provide direct services to said child.

Ex. S-35.

12. The stipulation applies to a limited number of identified exceptional children, between the ages of 3 and 21, each of whom was placed in an approved nonpublic school prior to the 1978-79 school year because "the local

educational agency did not provide direct services to said child." Id.

13. Under La. Rev. Stat. § 17:1949, a parish or city school board or special school district is authorized to enter into a purchase of services agreement with any nonpublic school agency or institution to provide free appropriate education to exceptional children in need of special education and related services. In purchasing such services, the local school board is "authorized to negotiate a contract for special education and related services and to pay tuition or other costs not to exceed the average gross costs per educable child in the school district plus the pro rata part of the state allotment" provided in La. Rev. Stat. Ann. § 17:1956 for serving students requiring special education and related services. La. Rev. Stat. Ann. § 17:1949 (West 1982).

14. The Department of Education may contract with nonpublic agencies to provide special education and related services subject to the conditions and limitations of the statute. La. Rev. Stat. Ann. § 17:1950 (West 1982).

15. The Jefferson Parish School Board (JPSB) is a political subdivision of the State of Louisiana. It is vested with the authority to direct the operations of the Jefferson Parish Public School System (JPPSS), subject to the rules and regulations promulgated by the Louisiana State Board of Elementary and Secondary Education (BESE).

16. Special Educational Services Corporation (SESC) was established as a Louisiana nonprofit corporation in 1981. It was organized for the purpose of "assisting students who are having academic and behavior problems to cope in the school environment." Doc. 250, p. 163.

17. SESC was originally funded with $1.65 million by the 1982 Louisiana legislature. Ex. P-253.

18. Since at least 1987, SESC has not received any funds from the State of Louisiana or any other governmental body. Doc. 250, p. 164.

19. At the time of trial, the sole employee of SESC was the executive director, Jan Janz, who volunteered her time to the corporation. Her paid position was with the Office of Special Education for the Archdiocese of New Orleans. Id. at pp. 76, 78, 105, 134.

20. The members of SESC are "the respective Presidents of the Archdiocesan School Board and Diocesan School Board of the Roman Catholic Archdiocese of New Orleans, and the Roman Catholic Diocese of Lafayette, Baton Rouge, Houma-Thibodaux, and Lake Charles, and a representative to be appointed by the Bishop of the Diocese of Alexandria-Shreveport respectively." John C. Rice, Jr. Dep. at 43-44. The corporate members appoint the Board of Trustees. Id. at 45.

21. The Court finds that SESC is a religiously-affiliated corporation.

22. In Jefferson Parish, special education services have been provided by public school teachers to nonpublic school students on the premises of schools operated under the authority of the Archdiocese of New Orleans under a contract entered into between the JPSB and SESC. Ex. S-9.

23. JPPSS first assigned special education teachers to instruct students at nonpublic schools during the 1975-76 school year. Ex. P-253. Four teachers and four aides were

placed. The reason for this placement was "the lack of classroom space in the public school system. Id.

24. By the 1982-83 school year, the request had increased to 105 special education teachers and 71 aides for the nonpublic schools. The estimated cost to the Jefferson Parish Public School System was $504,871.00. Ex. P-253, p. 12.

25. In the Fall of 1982, Barbara Turner Windhorst was the Director of Special Education for the Jefferson Parish Public School System and Dr. Carolyn Weddle was the Assistant Superintendent for Instructional Programs for the school system. Dr. David DeRuzzo, the Superintendent of Schools for the JPPSS, directed Dr. Weddle and ultimately Ms. Windhorst to research the issue of special education teachers assigned by the JPPSS to nonpublic schools and to provide him with information for a report to the school board. Doc. 255, p. 96.

26. In his report to the school board, Dr. DeRuzzo noted:

> The continued dramatic escalation of requests for special education teachers and aides by the approved non-public schools emphasizes three issues:
>
> a. the possible loss of student population to the parochial schools, especially at the high school level where parochial secondary schools who have never offered special education classes are now proposing them.
>
> b. will the SESC continue its source of funding and its willingness to contribute to the cost of teachers and aides?

c. parents of public school special education students complain that our most experienced and best educated teachers request voluntary transfer to parochial and private settings leaving the public school special education students with some teachers who are not certified in special education.

Ex. P-253, p. 11.

27. The Jefferson Parish School Board at its September 15, 1982 meeting directed the Superintendent to develop a cooperative plan between the Jefferson Parish Public School System and the approved non-public schools to accomplish the following:

1. An approach to controlling the growth in the number of teachers placed in non-public schools

2. A more equitable method of placing qualified special education teachers (See Exhibit III)

Ex. P-253, p. 1.

28. On October 5, 1982, Dr. DeRuzzo sent a letter to Mr. Howard Jenkins, Superintendent of Schools for the Archdiocese of New Orleans, concerning the development of policy and procedures for the placement of special education classes and teachers in nonpublic schools. Ex. P-253, pp. 20-21. A committee comprised of staff from the Archdiocese and staff from the Jefferson Parish Public School System was formed to develop procedures for placement of special education classes and teachers in nonpublic schools. The goals/guidelines to be achieved were as follows:

a. Planned approach to capping and reducing Special Education classes authorized to non-public schools; and

b. An equitable plan to place special education certified teachers in the public schools before placement in non-public schools is finalized each year and during the adjust period of the school year.

Id. at 21.

29. The recommendations on staffing and funding emanating from negotiations between JPPSS and the Archdiocese of New Orleans, as well as the contractual agreement between JPPSS and the Jefferson Federation of Teachers, anticipated the following results:

a. That the present level of funding for teachers and aides currently working in the Archdiocesan schools will be maintained. (This excludes those teachers covered under the contractual agreement for 1982-83 with Special Educational Services Corporation.)

b. Should Special Educational Services Corporation not renew its contract as implemented during the 1982-83 session, the Archdiocese will be responsible for assuming all local costs for those teachers and aides.

c. That beginning with the 1983-84 academic year, the total local costs for any new positions or vacancies for teachers or teacher aides will be borne by the Catholic schools to which these persons are assigned.

d. That capping of the Jefferson Parish Public School System costs at the 1982-83 level will not affect any new special education classes the Archdiocese might establish; the total local costs for such classes, however, will be the responsibility of the individual schools.

e. That new classes will be allowed to be established in the Archdiocesan schools.

f. That there will be no reduction in the number so [sic] teachers over a period of time.

Ex. P-253, p. 3.

30. The report (Ex. P-253) was submitted to the Jefferson Parish School Board, and the school board approved it. Doc. 255, pp. 98-99.

31. The contract entered into between the Jefferson Parish School Board (JPSB) and Special Education Services Corporation (SESC) for the 1989-90 school year provided that the JPSB shall hire up to 14 special education teachers and up to 5 teacher assistants. Ex. S-9. These teachers and assistants were assigned to the following nonpublic schools: Chinchuba Institute for the Deaf, Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen Elementary School. Id.

32. Under the contract, the classrooms were to be provided by SESC at no cost to the JPSB. Ex. S-9. The special education programs conducted in those classrooms were to be supervised by both the JPSB and the administrator of SESC. Id.

33. Pursuant to the contract, SESC billed the JPSB for the cost of the special education teachers and teacher assistants provided to the nine nonpublic schools. Ex. S-9. The cost for teachers and teacher assistants for the fiscal year 1989-90 was estimated at approximately $149,583.00. Id.

34. State funds appropriated by the Louisiana Legislature for the provision of special education and related services for exceptional children in Louisiana are distributed to the Jefferson Parish Public School System based on the number of exceptional children served by employees of the local school board, consistent with state-required pupil/teacher ratios for the provision of services to students with particular exceptionalities. Doc. 277, p. 90.

35. The public school system receives federal monies based on the "child count" of special education students enrolled at both public and nonpublic schools. Doc. 254, p. 136.

36. The salary of a special education teacher consists of 1) money from the minimum foundation program which is money that comes to Jefferson Parish from the State of Louisiana; and 2) the local salary supplement. Doc. 255, p. 78. In the public schools, the local salary supplement is paid by the Jefferson Parish School Board. In the nonpublic schools, the local salary supplement is paid by SESC. Id. SESC has agreed "to assume full responsibility for any portion of a teacher's or teacher assistant's salary and benefits not reimbursable by the State of Louisiana and/or the United States Government." Ex. S-9.

37. The minimum foundation money received from the State and the local salary supplement received from SESC are placed into the general fund of the Jefferson Parish Public School System. The salary of the special education teacher at the nonpublic school is then paid out of this general fund. Doc. 255, p. 100.

38. Since Ms. Janz became executive director of SESC in 1987, SESC has been funded by contributions from the nonpublic schools that are receiving special education services on their premises. Each school contributes a local

supplement for the special education teachers to SESC. SESC has a contract with each of the participating nonpublic schools called a donor agreement which sets forth the amount of money that the nonpublic school pays to SESC. Doc. 250, pp. 96-98.

39. The nine schools listed in the contract between SESC and JPSB all make contributions to SESC. The amount contributed is "an approximation of the local supplement for the teachers . . . ," that is, the difference between what the state pays for the teachers' salaries and "what Jefferson Parish school district would have to come up with in order to be able to pay the total salary for the teacher." Id. at pp. 96-97, 99-100.

40. The JPPSS special education teachers serving students in both public and nonpublic schools are all subject to the provisions of the same Collective Bargaining Agreement. Ex. S-6.

41. Article 18(G) of the 1989-90 "Agreement between the Jefferson Federation of Teachers and the Jefferson Parish School Board" specifically addressed the issue of the placement of special education teachers at nonpublic school sites. Ex. S-6, p. 20. Section G(2) states that "positions in special education classes which are provided in non public schools and are a duplication of services provided by the Jefferson Parish Public School System shall be filled only after all special education positions in the Jefferson Parish Public School System have been filled by certified special education teachers." Id. (Emphasis added).

42. Section G(5) is an exception to the requirement set forth in Section G(2). This section states that "the Board shall not involuntarily transfer special education teachers assigned to nonpublic schools prior to the 1983-84 school

session unless pupil-teacher ratio changes reduce teacher needs." Id.

43. Ms. Windhorst testified that this provision "means that those teachers who were assigned to nonpublic schools prior to the '83-'84 school year whether certified or not would remain in those settings and would not be involuntarily transferred . . . ." Doc. 255, p. 47.

44. The Court finds that Section G(5) of Article 18, which is in the current collective bargaining agreement, was originally placed there "in order to effect a compromise agreement involving" public school teachers providing special education services at nonpublic schools. Id. at p. 50.

45. Twelve of the fourteen special education teachers currently employed by JPPSS and providing services at the nonpublic schools are there by reason of Section G(5) of the collective bargaining agreement (the grandfather provision). Id. at p. 53.

46. The Court finds that there are positions to be filled for special education teachers in the Jefferson Parish public schools. These vacancies are for teachers certified in the mild-moderate category which is the same category held by the twelve public school teachers grandfathered into teaching at the non-public schools. Id. at pp. 55-57.

47. Louisiana law requires that each child must receive special education in the "least restrictive environment" appropriate for the child's individual educational needs. La. Rev. Stat. Ann. § 17:1946(A)(2) (West Supp. 1994).

48. The special education policies and procedures of the JPPSS are set forth in "Jefferson Parish Public School System Special Education Policies, Procedures, Practices

(1989)" (hereinafter "JPPSS Special Education Handbook"). Ex. S-15.

49. The JPPSS Special Education Handbook explains that the least restrictive environment means that "to the maximum extent appropriate, exceptional children, including children in public or private institutions or other care facilities, are educated with children who are not exceptional." Ex. S-15, p. 109.

50. In the special education field, a regular classroom with supplemental aids - such as speech services or visual aids - is considered the least restrictive environment for exceptional children. Doc. 250, pp. 150-51. A "resource room" program, in which a child spends 180 minutes or less of instructional time per day in the "resource room," with the remainder spent in a regular classroom, is the next least restrictive environment. Id. at p. 151. A "self-contained" special class is the next least restrictive environment. The student spends more than 180 minutes of instructional time in the "self-contained" special class and spends the remainder in the regular classroom. At a minimum, a student in a "self-contained" program must have homeroom, lunch, and recess with the nonhandicapped students. Id. at pp. 151, 173-74. A "special school" program, in which the entire school day is spent in special education, at a school attended only by other exceptional children, is more restrictive still. Ms. Janz testified that a child in this setting risks learning inappropriate behaviors and is not as challenged because of the lack of interaction with his "regular peers." Doc. 250, p. 151. More restrictive is a "residential special school." Ex. S-5, p. 40. A "hospital/homebound" program is for students who cannot function in any of the more socially interactive settings. Doc. 250, p. 152.

51. "The Least Restrictive Environment rules may not be waived by any party, including the parent(s)." Ex. S-5, p. 41.

52. The Louisiana Department of Education has determined that the school system should ensure that the exceptional child is placed "in the school which the child would attend if not exceptional, unless the IEP/Placement document requires some other arrangement." Ex. S-5, p. 39.

53. Jefferson Parish special education programs are provided to two distinct types of exceptional children. The first type are those exceptional children who have been placed by a public agency in a nonpublic residential facility. These children have been determined to require educational placement in a special day school.

54. The second group of exceptional children are voluntarily enrolled in an approved nonpublic school. They require educational placement in either a special education resource room or a special education self-contained classroom on a regular school campus.

55. The Chinchuba Institute for the Deaf is a nonpublic, independent special school which is not affiliated with a religious institution and where all of the students are deaf or hearing-impaired. Ex. S-9; Doc. 255, p. 35; Doc. 250, pp. 103, 163. Chinchuba is a "special nonpublic day school," as that term is used in La. Rev. Stat. § 17:1946(C)-(E) (West 1982) & (West Supp. 1994).

56. Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen Elementary School are affiliated with the Catholic Church. None of these

schools is a "special nonpublic day school" as that term is used in La. Rev. Stat. § 17:1946(C)-(E).

57. In addition to the annual contract entered into between Jefferson Parish School Board and SESC for services at Chinchuba Institute for the Deaf and the eight parochial schools, an annual contract for special education teachers and assistants is also entered into between JPSB and Hope Haven/Madonna Manor School. Ex. S-10. The contract is signed by the Executive Director of Associated Catholic Charities, the Administrator of Hope Haven/Madonna Manor, the Superintendent of the Jefferson Parish School Board, and the Director of the Special Education Department, Jefferson Parish School Board. Id.

58. Hope Haven/Madonna Manor is a special day school for students exhibiting behavior disorders to the degree of severe emotional disturbances. Doc. 255, p. 24. All of the students are handicapped. Id. These students cannot be assured a least restrictive environment on a regular school campus. Id.

59. The agreement entered into for the 1989-90 school year provided 15 special education teachers and 15 special education assistants at Hope Haven/Madonna Manor. Ex. S-10.

60. The students at Hope Haven/Madonna Manor residential facility are placed there by the State of Louisiana, the Office of Health and Human Development and/or by the court system. Doc. 255, p. 22; Doc. 277, pp. 90-91.

61. The teachers are paid from "minimum foundation monies" and the Jefferson Parish Public School System contributes the local funding. Doc. 254, pp. 149-50.

62. The estimated cost for the 30 teachers for the 1989-90 school year was $198,121.00. It was agreed "that there is no cost incurred by Hope Haven/Madonna Manor (Associated Catholic Charities) for services stated in the agreement." Ex. S-10. The Jefferson Parish School Board was to be reimbursed by the State by way of the "minimum foundation formula." Id. It was further noted that "the cost to the Jefferson Parish Public School System would be greater if it assumed direct responsibility for the special education needs of children handled by HOPE HAVEN/MADONNA MANOR." Id.

63. During the 1989-90 school year, there were approximately 103 students attending Hope Haven/Madonna Manor School. Doc. 257, p. 9.

64. No classes in religion or theology are offered at the Hope Haven/Madonna Manor school. Id. at p. 13.

65. There are no religious symbols in Hope Haven/Madonna Manor. Id.

66. A Catholic church is located near the school. Id. It is used for school assemblies.

67. The principal of Hope Haven/Madonna Manor is a lay person, Barbara Garland. She is employed by Associated Catholic Charities. Id. at p. 4. Ms. Garland reports to the administrator of Hope Haven/Madonna Manor, Robert Guasco.

68. Two Catholic sisters teach at Hope Haven/Madonna Manor.

69. All of the teachers at Hope Haven/Madonna Manor are Jefferson Parish Public School System teachers. Doc. 255, pp. 23-24.

70. Neither Hope Haven/Madonna Manor nor Chinchuba Institute for the Deaf are under the supervision of Mr. Howard J. Jenkins, the Superintendent of the Archdiocese of New Orleans School System. Doc. 250, pp. 58-59.

71. State regulations governing special education programs are contained in Louisiana Department of Education Bulletin 1706, "Regulations for Implementation of the Exceptional Children's Act" (Revised 1983). Ex. S-5.

72. Additional state policies and procedures related to special education are described in Louisiana Department of Education Bulletins 741, "Louisiana Handbook for School Administrators" (public and private) (Revised 1983); 1508, "Pupil Appraisal Handbook" (Revised 1983); and 1530, "Louisiana's IEP Handbook" (Revised 1989). Exs. D-86, S-14, and S-13.

73. The "Regulations for Implementation of the Exceptional Children's Act" (hereinafter "State Regulations") require that each school system and the Department of Education develop and formally enter into an interagency agreement. Ex. S-5 § 801. Since the relationship between the Department of Education and the school system is defined by the State Regulations "in regard to providing a free, appropriate public education to exceptional children," the interagency agreement need not define such relationships. Id. § 810. The purpose of an interagency agreement is to assure that state standards established to guarantee a free, appropriate public education for exceptional children are implemented by "approved public or nonpublic agencies not within the governance of the State Board . . . ." Id. § 820.

74. Interagency agreements may be entered into between a city/parish school system and either "a licensed and approved nonpublic habilitation agency" or "a licensed and approved nonpublic education and habilitation agency." Ex. S-5 § 830.

75. An interagency agreement was entered into between the JPSB and SESC which was to be effective for one year beginning on July 1, 1989. Ex. S-12. It was signed by Dr. Russell J. Protti, Superintendent of the JPPSS; Jan Janz, Executive Director of SESC; and Barbara C. Adams, Director of the Special Education Department of the JPPSS. The stated purpose of the agreement was "to formalize the cooperation and to identify the responsibilities of the Jefferson Parish School Board and the Special Educational Services Corporation in order that Special Education Services be offered to the students enrolled at the Special Educational Services Corporation eligible schools." Id.

76. The interagency agreement between JPSB and SESC does not specifically provide for monitoring to determine whether the special education teacher engages in either religious discussion or religious conduct. Ex. S-12. The contract only provides that the principal of the nonpublic school "will ensure that the policies and procedures of the Jefferson Parish School Board will be followed in all areas of cooperative effort." Id.

77. In the interagency agreement, the Jefferson Parish Special Education Department provides the following special education services to the nine "Special Education Services Corporation schools":

A. Conduct inservices to include non public special education teachers, assistants, and administrators

B. Provide personnel to monitor special education programs and review I.E.P. records

C. Assure the coordinator's attendance at I.E.P.s when requested

D. Provide staff assistance in program development and implementation

E. Provide surrogate parent training for those students in need of surrogate parents

F. Provide all necessary LANSER tracking, I.E.P. and periodic progress forms

G. Provide personnel for data entry (LANSER) and tracking of evaluations, I.E.P.s and related services

H. Provide teachers with materials and equipment through the Material Resource Center check system

I. Provide pupil appraisal personnel supplemental salaries for the tenth (10) month of employment

J. Provide Health Services (Related, to include occupational therapy, physical therapy, audiological and hearing aid evaluations), when appropriate

K. Monitor all non public school students' evaluations to ensure compliance with Bulletin 1508.

L. Type, copy and disseminate evaluations to non public schools and parents

M. Provide materials of instruction amounting to 26% of the FY 90 EHA-B Flow-Through Budget allocated to voluntarily enrolled students

Ex. S-12.

78. Walter B. Gatlin, the Assistant Superintendent of Education, Division of Special Educational Services, Louisiana Department of Education, testified that the State sends state personnel to inspect the special education programs on the premises of certain nonpublic schools on a scheduled basis once every three years. Doc. 257, p. 64. "Programs throughout the school district are- selected randomly by school and by students to ensure that the school

district is adhering to all the policies and procedures for the education of the handicapped child." Id. at 65.

79. In their inspection, the State reviews the school records of the special education students attending nonpublic schools "very thoroughly" and confers with the principal and the teachers in the nonpublic schools. Doc. 257, p. 70.

80. Principals at nonpublic schools in Jefferson Parish at which JPPSS special education teachers serve handicapped students must by contract with the Jefferson Parish School Board enforce, apply, and follow all Jefferson Parish School Board personnel policies and procedures, including but not limited to the Collective Bargaining Agreement, the Teacher Evaluation Program, and the Teacher Assistant Evaluation Program, in the "management and supervision of the teachers" employed by the JPPSS. Ex. S-9.

81. The teaching responsibilities of each JPPSS special education teacher are described in the Individualized Education Program (IEP) of each of the teacher's students. E.g., Doc. 250, pp. 130, 161. The IEP of each student describes the child's entire special education curriculum. Pursuant to state regulation, "the responsibility for the development of each initial IEP rests with the [public] school system's special education supervisor." Ex. S-5, Special Ed. Regs. § 440.D.

82. Religious instruction is not described in the IEP.

83. No church or religious officials have any authority whatsoever over the content of the IEP. Doc. 250, p. 161.

84. Special education teachers must and do teach only what is outlined in the IEP. Id. at pp. 130, 161.

85. The JPPSS special education teachers at the nonpublic schools do not teach religion. Id. at pp. 131, 168; Doc. 251, p. 63; Doc. 252, p. 27.

86. The special education classrooms within the nonpublic schools are used only for special education instruction. Doc. 250, pp. 86-87, 122-23, 150-51.

87. JPPSS special education teachers at the eight Catholic schools are not required to attend any religious services. Doc. 251, pp. 63, 65; Doc. 252, pp. 26-27; Doc. 253, pp. 38, 87-88; Doc. 254, pp. 65-66.

88. JPPSS special education teachers provide grades (in addition to progress reports) on nonpublic school report cards. "Grading is based on the student's progression through a continuum of skills, with grades reflecting the student's effort rather than a specific amount or rate of progress." Ex. S-15, p. 25.

89. Nonpublic school principals may assign JPPSS special education teachers nonteaching custodial duties involving oversight of student safety and behavior - such as lunch duty or bus duty - only in a manner consistent with the Collective Bargaining Agreement. Ex. S-6, Art. 31; Doc. 255, p. 70.

90. Pursuant to the Collective Bargaining Agreement, JPPSS special education teachers may also be required to attend faculty meetings no more frequently than once per month, for one hour. Ex. S-6, Art. 26; Doc. 255, pp. 69-70.

91. In the contract between the JPSB and SESC, it is stated that "teacher evaluation in the non-public schools falls under the auspices of the Jefferson Parish Public School System; therefore, the non-public schools must follow all policies

and procedures of the Jefferson Parish Public School System governing teacher evaluation." Ex. S-9.

92. The contract between the JPSB and SESC also stipulates that in the nonpublic schools, principals and special education teachers shall participate in evaluation and special education policies and procedures. Ex. S-9.

93. The principal at the nonpublic school completes the JPPSS evaluation form for the JPPSS special education teacher assigned to that school. Doc. 251, pp. 35, 83-85, 90; Doc. 255, pp. 59-61.

94. The special education teachers teach throughout the day in self contained or resource classrooms within each Catholic school's facility. Doc. 254, pp. 23-24, 62.

95. In all schools where it provides special education services, JPPSS requires that classrooms for learning disabled students "be located in the center of the school" because a "central location makes it easier for students to get to their classroom[,] reduces the time they are in transit in the halls (and) allow(s) [the] students to be mainstreamed as needed." Ex. S-15, p. 28.

96. In most nonpublic schools in Jefferson Parish, special education classrooms are located in the main school building or on the main school campus. Doc. 250, pp. 86, 157-159; Doc. 251, pp. 9, 73-74; Doc. 253, pp. 9-10; Doc. 254, p. 60; Doc. 274, p. 38. The special education classroom is located in a portable unit at St. Christopher's Elementary School. Doc. 250, p. 159.

97. In the nonpublic schools in Jefferson Parish, there is no sign or other special designation indicating that the special

education classroom or area used is a public school classroom or area. Id. at p. 126.

98. The parents of the special education students are informed that the special education teachers are employed by the Jefferson Parish School Board at the yearly IEP meeting. Id.

99. The Director of Special Education for the Jefferson Parish Public School System, Barbara C. Adams, testified that the school system is "not establishing new classes for providing teachers" at nonpublic school sites, but has continued "to provide teachers to those classes who have been in existence and by attrition to gradually phase that component out . . . ." Doc. 254, p. 99. She admitted that the school system is not increasing on-site special education services at other nonpublic schools, and had decreased the number of participating schools since she has been special education director. Id. at p. 100.

100. Ms. Adams agreed that one of the reasons why the school system was not increasing the number of nonpublic schools offering special education services was because the JPPSS was now able to offer those services at public school sites. Id. at p. 101.

101. Ms. Adams also testified that under the current policy for the Jefferson Parish Public School System, a nonpublic school student cannot receive special education services at a public school site. Nonpublic school students can only receive "related services," such as speech therapy, at a public school site. Id. at pp. 125-26.

102. Louisiana's IEP Handbook, prepared by the Louisiana Department of Education, states:

> The public school system is not required to serve voluntarily enrolled students in nonpublic schools. Parents should be informed that in choosing not to accept the available free, appropriate public education, their rights and those of the student to services, due process, and procedural safeguards are limited.

Ex. S-13, p. 52.

103. At the time of trial, intervenor, JacLynn Welsch, had a son, Christopher, at St. Angela Merici Catholic School located within Jefferson Parish. Welsch Dep., p. 10. She was employed at St. Angela as a playground monitor and as a substitute teacher. Id. at 32-34. She also performed volunteer work in the school library. Id. at 35. In 1990, she volunteered to assist Jean Douglass, a Jefferson Parish special education teacher who teaches at St. Angela Merici. Id. at 36.

104. Intervenor Welsch indicated that Jean Douglass provides special education services to the upper grades in a classroom which is partially partitioned. Id. at 37. The classroom also serves as the special education room for another special education teacher. Ms. Welsch testified that there is a crucifix in the room. Id. at 38.

105. Mary L. Cerise testified that she is currently employed by the Jefferson Parish Public School System as a special education teacher at St. Angela Merici. Doc. 253, pp. 4-5, 9. Prior to her employment as a special education teacher by the Jefferson Parish Public School System, she was employed by St. Angela Merici for approximately 10 years as an elementary education teacher. Id. at 6.

106. Mrs. Cerise did not remember for certain whether there was a sign posted at the entrance of her classroom indicating the type of classroom, but she did not think there

was any designation. Id. at 16. She has told her students that she is employed by the Jefferson Parish Public School System. Id. She stated that the parents became aware of her employment when they signed the child's Individualized Education Program (IEP). Id. at 16-17.

107. Parent-teacher conferences are held in Mrs. Cerise's classroom and are scheduled the same day the parents have parent-teacher conferences with other teachers employed by St. Angela Merici. Doc. 253, p. 18.

108. Mrs. Cerise, in testifying about her contacts with the principal of St. Angela Merici, indicated that "we see him in the morning for a cup of coffee in the lounge and during the day he often walks in and out of the classrooms." Id. at 20. When asked at the trial why the principal walks into her classroom, Mrs. Cerise responded: "I suppose that's part of his job description." Id. at 21.

109. Mrs. Cerise testified that the principal was her immediate supervisor in that "his position is to see that [she] implement[s] the program as outlined on the individual educational program and that [she is] carrying out the instructional objectives and trying to meet the needs of each child that is in [her] care." Id. at 24.

110. No state employee has monitored Mrs. Cerise's classroom activities. Id. at 25.

111. Prior to her tenure, an employee of the Jefferson Parish Public School System would regularly monitor her files and her classroom activities at the school. Id. However, since she has been tenured, everything that she does is written down clearly on the IEP and "sent to an IEP specialist" and thereafter returned to her stating either that

everything was all right or "this or the other had to be done." Id. at 25.

112. The IEP specialist, Barbara Cavallino, a JPPSS employee, did not visit St. Angela Merici during the present school year, but did visit once during the last school year. Id. at 26.

113. Mrs. Cerise's contact with the IEP specialist is normally by telephone and occurs when she has an "academically or IEP related" question that she wants clarified. Id. at 40.

114. In addition to the IEP file stored in the classroom of the special education teacher, St. Angela Merici also maintains a separate file on each student in the administrative office of the school. Id. at 29. Those files contain the "cumulative reports which is a copy of the child's work record and history, academic, behavioral, and what have you on each student as well as the file that keeps the current report cards." Id.

115. The parochial school, such as St. Angela Merici, issues the report card for each student in the school. In addition, the special education teacher, such as Mrs. Cerise, completes a progress report which is required by the Jefferson Parish Public School System for every special education student. Id. at 30.

116. Mrs. Cerise attends faculty meetings at St. Angela Merici on a monthly basis. Id. at 34. She attended one general workshop for all special education teachers sponsored by the Jefferson Parish Public School System at the beginning of the school year. Id. at 39.

117. During the past school year and at the end of the prior school year, the JPPSS furnished materials and supplies

valued at $60.00 to each special education student at St. Angela Merici. Id. at 49.

118. A special education student attending St. Angela Merici who pays full tuition pays an additional $500.00 fee to help "balance out the budget." Doc. 251, p. 22.

119. A special education student attending St. Agnes pays an additional $300.00 fee. Doc. 252, p. 11. These fees are used to provide a "donation" to SESC. Id. at 12.

120. The Jefferson Parish Public School System does not charge tuition for any of the special educational services stated on the IEP. Doc. 254, p. 154.

121. According to the "Regulations for Implementation of the Exceptional Children's Act" prepared by the Louisiana Department of Education, "the term 'free' does not preclude incidental fees normally charged to nonhandicapped children or their parent(s)/guardian(s) as a part of the regular educational program." Ex. S-5, p. 17.

122. The principal of the nonpublic school is the supervisor and "formal evaluator" of the special education teachers in that school. Doc. 254, pp. 142-44; Doc. 255, pp. 59-61.

123. The special education teacher at a nonpublic school site is considered by the personnel department of the Jefferson Parish Public School System to be part of the faculty of the nonpublic school. Doc. 255, p. 69.

124. Ms. Janz has "general supervision" of the special education program provided on the premises of the nonpublic schools by the contract between SESC and the JPPSS. Doc. 250, p. 82. She visits the special education

classrooms and monitors the evaluations and the IEPs of the special education students that are on file. Id. at 85.

125. Barbara Turner Windhorst, the director of special education from June of 1982 until January of 1987, was not aware of any policy established by the Jefferson Parish Public School System which required the director of special education to observe whether religious symbols were present in the special education classrooms. Doc. 255, p. 73. She did not investigate for the presence of religious symbols, and did not recall whether any religious symbols were present in the special education classrooms. Id. at 73-74.

126. Ms. Janz testified that she did not specifically monitor for religious symbols in the special education classrooms, but that if she observed a religious symbol in the classrooms, she "would ask that they remove it." Doc. 250, p. 188.

127. The State of Louisiana has no policy that requires its employees to inspect the special education classrooms in nonpublic schools for religious symbols. Doc. 257, p. 94.

128. The Court finds that special education teachers employed by the Jefferson Parish School Board provide special education services on the premises of parochial schools.

129. The Court finds that there was no financial incentive for the parents of special education students to choose a nonpublic school. In fact, it is undisputed that the students would have received special education at no cost in the public schools. Instead, the parents of special education students elected to pay an extra charge, in addition to the regular tuition, in order for their children to attend a parochial school.

130. The State of Louisiana is presently disbursing funds to Jefferson Parish to provide special education services to all qualified children in Jefferson Parish, whether they attend public or nonpublic schools.

131. The Court finds that no state, federal, or Jefferson Parish funds are paid directly to SESC or to the parochial schools. Rather, SESC contributes monies to the Jefferson Parish School Board to help pay for the salaries of the JPPSS special education teachers located at the parochial schools. SESC receives its monies from the individual schools providing the special education services.

132. The Court finds that the parochial schools have received a direct economic benefit by furnishing special education services on their premises. The parochial schools receive tuition and a special education surcharge from the special education students, yet they are not responsible for the full salaries of the JPPSS special education teachers. The JPPSS special education teachers are paid by the Jefferson Parish School Board with funds primarily obtained from the State of Louisiana and supplemented by the parochial schools through SESC.

133. The Court also finds that if the special education services were not provided at the nonpublic schools, those special education students would be compelled to attend public schools which provide the necessary services at no charge to the parents. Thus, the nonpublic schools would be deprived of an economic benefit, that is, the tuition and the special education surcharge received from the special education students.

CONCLUSIONS OF LAW

1. The Establishment Clause of the First Amendment to the Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

2. The Establishment Clause has been applied to state governments through the *Fourteenth Amendment. Everson v. Board of Education of Ewing Township, 330 U.S. 1, 15, 91 L. Ed. 711, 67 S. Ct. 504 (1947).*

3. An institution can be deemed "pervasively sectarian" if within that institution "'religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.'" *Bowen v. Kendrick, 487 U.S. 589, 610, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988)* (quoting *Hunt v. McNair, 413 U.S. 734, 743, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)).*

4. The Court has already determined that the parochial schools operated under the auspices of the Archdiocese of New Orleans are pervasively sectarian. Doc. 220. Thus, the Court finds that Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen Elementary School are pervasively sectarian.

5. No evidence was submitted at the trial to show that Chinchuba Institute for the Deaf is a pervasively sectarian institution. Thus the Court finds that Chinchuba Institute for the Deaf is not a pervasively sectarian institution.

6. The Court finds that Hope Haven/Madonna Manor is not a pervasively sectarian institution.

7. In 1971, the Supreme Court decided *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971),* which set forth a three part test to analyze Establishment Clause cases: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" (Citations omitted). The Lemon test has been much criticized by various Justices, but the decision has not yet been overruled. See *Lamb's Chapel v. Center Moriches Union Free School Dist., 124 L. Ed. 2d 352, U.S. , 113 S. Ct. 2141, 2148 n.7 (1993).* The Lamb's Chapel majority noted in a footnote that:

> there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987),* presents no occasion to do so.

Id. Thus even though Lemon has not been overruled, its continuing vitality appears to be in question.

8. In *Zobrest v. Catalina Foothills School District, 125 L. Ed. 2d 1, U.S. , 113 S. Ct. 2462 (1993),* the United States Supreme Court most recently addressed the Establishment Clause. Chief Justice Rehnquist delivered the opinion of the Court. The Supreme Court did not apply the Lemon test, even though the Court of appeals had applied Lemon. Id. at 2464-65. Instead the Zobrest Court applied the reasoning in *Mueller v. Allen, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983),* and *Witters v. Washington Dep't of Services for*

Blind, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986), two cases decided using the Lemon test. Id. at 2466-67. The Zobrest Court found that the facts in that case more closely resembled Mueller and Witters, rather than *Meek v. Pittenger, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975),* and *School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985),* which also were decided using the Lemon test. Id. at 2468-69. In Mueller and Witters, the Establishment Clause challenges were rejected; in Meek and Ball, however, the state statutes were struck down as being in violation of the Establishment Clause. *Zobrest, 113 S. Ct. at 2466-69.*

9. The Zobrest Court held that the Establishment Clause does not bar a school district from furnishing a handicapped child with a sign-language interpreter at a parochial school "in order to facilitate his education." *113 S. Ct. at 2469.* The Zobrest Court found important the manner of funding of the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. §§ 1400*-1485. First, the Court found that providing the sign-language interpreter did not "relieve[] sectarian schools of costs they otherwise would have borne in educating their students." Id. at 2468. Second, the Court found that "any attentuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to 'the private choices of individual parents.'" Id. at 2469. Third, parochial-schools are only "incidental beneficiaries" and handicapped children are the primary beneficiaries of the IDEA. Id. Finally, the Zobrest Court found that "the function of the IDEA is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" Id. (quoting *Witters, 474 U.S. at 488).*

10. The Zobrest Court highlighted the fact that the program did not create a "financial incentive for students to undertake sectarian education." *113 S. Ct. at 2467.* The "only indirect

economic benefit" to the parochial school was perhaps the child's tuition, and even this benefit is based on the presumption that without the interpreter, the deaf child would have gone to another school and the parochial school would not have been able to fill that child's spot. Id. at 2468.

11. The Zobrest Court stated that the Supreme Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Id. at 2466.

12. The Court finds that the parents of the special education students in the eight parochial schools in Jefferson Parish operated by the Archdiocese of New Orleans "have chosen of their own free will" to place their children in a "pervasively sectarian environment." Id. at 2469.

13. Since the facts of the instant case also involve the presence of a public employee on the premises of a parochial school, this Court will follow the example of the Zobrest Court and will decide whether the instant case more closely resembles Mueller and Witters or Meek and Ball.

14. The Zobrest Court distinguished *School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985),* which struck down public school programs which provided public school teachers on private school premises as well as instructional equipment and material. The Zobrest Court found that the programs challenged in Ball "in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *113 S. Ct. at 2468.* On the other hand, the providing of a sign-language

interpreter on the premises of a sectarian school was not found by the Zobrest Court to "amount to 'an impermissible "direct subsidy"' of the sectarian school, because the sectarian school was "not relieved of an expense that it otherwise would have assumed in educating its students." Id. at 2468-69.

15. In *Meek v. Pittenger, 421 U.S. 349, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975),* the Supreme Court found unconstitutional a Pennsylvania statute which provided "auxiliary services" to nonpublic school children with the appropriate special need. The services were provided only on the premises of the nonpublic schools by personnel employed by the public school system. "Auxiliary services" included teaching and related services for exceptional children. *Id. at 353.*

16. In *Aguilar v. Felton, 473 U.S. 402, 421, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985),* Justice O'Connor noted in her thought provoking dissent that the Meek Court set forth the theory "that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state." The Aguilar majority held that the detailed monitoring and close administrative contact" by public authorities in sectarian schools, necessary when public employees teach in sectarian schools, causes excessive entanglement between church and state. *Id. at 412-14.*

17. In *Mueller v. Allen, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983),* the Supreme Court upheld a Minnesota statute which allowed state taxpayers to deduct expenses on their state income tax incurred in providing for the education of their children. The Court pronounced that it has consistently rejected the argument that "'any program

which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Id. at 393.* The Court emphasized the fact that this public assistance was granted to parents of children attending both public and nonpublic schools. *Id. at 398.* Another "material consideration" was the fact that the State transmitted the aid to the parents, rather than to the schools themselves. *Id. at 399.* The aid to the parochial schools was then made available through the individual parents who made private choices to send their children to parochial schools. Id. The Mueller Court found this to be an "attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools . . . ." *Id. at 400.*

18. In *Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 482, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986),* the Supreme Court found that the First Amendment did not preclude the State of Washington from providing assistance to a blind person studying at a Christian college under a state vocational rehabilitation assistance program. The Court noted that "it is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." *Id. at 486.* However, the Court also enunciated that a "State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id. at 487.* The Witters Court then examined the aid granted to the petitioner to determine under which category it best corresponded. Id.

19. As in Mueller, the Witters Court emphasized to whom the aid was paid, individuals or the parochial schools themselves. The Witters Court noted that the financial assistance was paid directly to the student who then paid the

educational institution. *484 U.S. at 487.* Thus, as opposed to the situation in Ball, the aid "that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." Id. Thus "the decision to support religious education is made by the individual, not by the State." *Id. at 488.*

20. The Court finds that the situation in the instant case more closely resembles Meek and Ball, rather than Mueller and Witters. The Jefferson Parish Public School System provides special education teachers to teach on the premises of nonpublic schools. The special education teachers at the nonpublic schools are paid by the JPPSS with minimum foundation funds provided by the State and funds provided by SESC. The Court finds that the assistance is given directly to the schools themselves, and not indirectly through the parents or students.

21. The Court finds relevant the statements made by Judge Friendly as quoted in the Ball decision:

> Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.

473 U.S. at 392 (quoting *Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48, 67-68 (1984)).*

22. The Court concludes that the JPPSS special education teachers are "performing important educational services in

schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek, 421 U.S. at 371.*

23. To ensure that JPPSS special education teachers remain "religious neutral," the State and Jefferson Parish would have to "engage in some form of continuing surveillance to ensure that those restrictions were being followed." *Id. at 372.* This surveillance could result in administrative and political entanglement between the parochial schools and the State and Jefferson Parish. The Meek Court found this potential for administrative and political entanglement to be one of the evils that the Establishment Clause was designed to protect against. Id.

24. Considering all of the circumstances, applying the holdings of Meek and Ball, the Court is compelled to find that the special education statute, La. Rev. Stat. §§ 17:1941-1956, which allows state-paid special education teachers to teach on the premises of pervasively sectarian institutions, violates the Establishment Clause as applied.

25. Because neither Chinchuba Institute for the Deaf nor Hope Haven/Madonna Manor is a pervasively sectarian institution, the Court finds that there is no significant risk that JPPSS special education teachers at Chinchuba Institute for the Deaf and Hope Haven/Madonna Manor will "have the primary effect of advancing religion" or will cause "excessive entanglement" of government with religion. Thus, the Court finds that the special education statute which allows state-paid special education teachers to teach on the premises of Chinchuba Institute for the Deaf and Hope Haven/Madonna Manor does not violate the Establishment Clause.

26. Plaintiffs have also asked this Court to decide whether the Louisiana statutory provisions, specifically La. Rev. Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950, authorizing the funding of special education programs on the premises of pervasively sectarian institutions are unconstitutional on their face.[7]

27. Plaintiffs contend that La. Rev. Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950, which authorize state or local school districts to enter into contractual arrangements with nonpublic institutions for the provision of special education programs, do not contain any legislative restriction to protect against the unconstitutional fusion of state and sectarian activities and/or the providing of sectarian education, training, or other activities at public expense.

28. In *Bowen v. Kendrick, 487 U.S. 589, 610, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988),* the Court held that "a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions."

29. As in Bowen, the Court finds that nothing on the face of La. Rev. Stat. §§ 17:1944, 17:1946, 17:1949, or 17:1950, which permit contractual arrangements with nonpublic institutions for the provision of special education programs, indicates that "a significant portion" of either state or local school district funds will be disbursed to "pervasively sectarian" institutions. *Bowen, 487 U.S. at 610.*

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[7] Plaintiffs also claimed that La. Rev. Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950 in particular are unconstitutional as applied. Since the Court has now ruled that La. Rev. Stat. §§ 17:1941-1956, which allow state-paid special education teachers to teach on the premises of pervasively sectarian institutions, are unconstitutional as applied, the Court finds that ruling to be controlling.

30. The Bowen Court noted that the Supreme Court has never stated that a "statutory restriction" expressly preventing the use of state or local funds for religious purposes is constitutionally required. *487 U.S. at 614* (Emphasis added). The Court thus finds that such a restriction is not required.

31. The Court finds that La. Rev. Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950 do not violate the Establishment Clause on their face.

II. THE REQUIRED SERVICES REIMBURSEMENT PROGRAM

WHETHER LOUISIANA'S LEGISLATIVELY-ADOPTED PROGRAM FOR THE PROVISION OF REIMBURSEMENT TO NONPUBLIC SCHOOLS FOR ADMINISTRATIVE EXPENSES IS CONSTITUTIONAL.

FINDINGS OF FACT

1. The plaintiffs challenge the facial validity of La. Rev. Stat. Ann. §§ 17:361-365 (West 1982), the "Reimbursement of Required Costs" statute, and challenge the statute as applied.

2. La. Rev. Stat. §§ 17:361-365, the "Reimbursement of Required Costs" statute, establishes a program for reimbursing approved nonpublic schools for their actual costs incurred in maintaining records and providing administrative services that are required by state or local law, rule or regulation.

3. La. Rev. Stat. § 17:361 specifically provides:

> The superintendent of education, in accordance with rules and regulations adopted by the Board of Elementary and Secondary Education, shall annually reimburse each approved nonpublic school, for each school year beginning on and after July, 1979, an amount equal to the actual cost incurred by each such school during the preceding school year for providing school services, maintaining records and completing and filing reports required by law, regulation or requirement of a state department, state agency, or local school board to be rendered to the state, including but not limited to any forms, reports or records relative to school approval or evaluation, public attendance, pupil health and pupil health testing, transportation of pupils, federally-funded educational programs including school lunch and breakfast programs, school textbooks and supplies, library books, pupil appraisal, pupil progress, transfer of pupils, teacher certification, teacher continuing education programs, unemployment, annual school data, and any other education-related data which are now or hereafter shall be required of such nonpublic school by law, regulation or requirement of a state department, state agency, or local school board.

La. Rev. Stat. Ann. § 17:361 (West 1982).

4. The statute authorizes reimbursement to the nonpublic school for three separate and distinct activities: 1) the provision of school services; 2) the maintaining of records; and 3) the completing and filing of reports. La. Rev. Stat. Ann. § 17:361.

5. La. Rev. Stat. §§ 17:362 and 17:364 provide that no approved nonpublic school may receive a payment pursuant to La. Rev. Stat. § 17:361 unless the school has submitted to the superintendent an application containing the information

and documentation required by the superintendent, and the superintendent has approved the application. La. Rev. Stat. Ann. §§ 17:362, 17:364 (West 1982).

6. La. Rev. Stat. § 17:363 further requires that each school which seeks reimbursement "shall maintain a separate account or system of accounts for the expenses incurred in rendering the required services for which reimbursement is authorized by R.S. 17:361." La. Rev. Stat. Ann. § 17:363 (West 1982). The records and accounts "shall contain such information and be maintained in accordance with regulations adopted by the [Board of Elementary and Secondary Education]." Id.

7. In addition, § 17:363 provides that "in promulgating such regulations concerning records and accounts and in requiring supportive documents . . . the superintendent shall implement the audit procedures provided in R.S. 17:365." Id. (Emphasis added).

8. "The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures." La. Rev. Stat. Ann. § 17:363.

9. Section 17:365 states:

> No application for reimbursement . . . shall be approved except upon such audit of vouchers or other documents by the superintendent as is necessary to insure that such payment is lawful and proper.
>
> The legislative auditor may from time to time examine . . . any and all accounts and records of a school which have been maintained pursuant to this Part in support of an application for reimbursement, for the purpose of determining the cost to such school of rendering the

> services referred to in R.S. 17:361. If after such audit it is determined that any school has received funds in excess of the actual cost of providing such services, such school shall immediately reimburse the state in such excess amount.

La. Rev. Stat. Ann. § 17:365 (West 1982) (Emphasis added).

10. The Court finds that there is no provision in La. Rev. Stat. §§ 17:361-365 specifically prohibiting the payment of administrative expenses relating to sectarian activity that may occur at the school.

11. The Court finds that there is no provision in La. Rev. Stat. §§ 17:361-365 requiring reimbursement only for the selection, administration, and grading of standardized tests approved by the State of Louisiana, and not for any teacher-prepared tests.

12. Pursuant to La. Rev. Stat. §§ 17:361-365, the Louisiana Board of Elementary and Secondary Education (BESE) has promulgated regulations governing the administration of the required costs reimbursement program. These are called "Regulations of Louisiana State Board of Elementary and Secondary Education Pursuant to Louisiana Revised Statutes 17:361-17:365" (hereinafter "BESE Regulations"). Ex. D-3; Doc. 265, pp. 92-94. The BESE Regulations have been in effect continuously since 1980, when they were promulgated, through the date of the trial. Ex. D-2, p. 2.

13. Section 2(a) of the BESE Regulations sets forth that the nonpublic school seeking reimbursement "shall submit an application . . . and shall submit completed reimbursement worksheets as may be required by the Superintendent of Education." Ex. D-3 § 2(a).

14. The BESE Regulations also require that schools seeking reimbursement maintain backup documentation in support of their reimbursement request, including (1) separate records of expenditure accounts for each required service; (2) separate employee time records indicating the amount of time that each employee devoted to each service for which reimbursement is requested; (3) individual employee salary records; and (4) a receipt file for paid bills for which reimbursement is sought. Ex. D-3 § 2(b)(1)-(4).

15. Section 4(a) of the BESE Regulations states that "to be eligible for reimbursement for required services, a nonpublic school must be approved by the Board of Elementary and Secondary Education . . . and must be in compliance with the order of the court in the case of Brumfield vs. Dodd." Ex. D-3 § 4(a).

16. Section 5 of the BESE Regulations entitled "Auditing" states: "(a) No application for reimbursement under this part shall be approved except such audit of receipts or other documents by the Superintendent as is necessary to insure that such payment is lawful and proper." Ex. D-3 § 5. In addition, the legislative auditor may from time to time examine the accounts and records of the nonpublic school "for the purpose of determining the cost to such school of rendering the services referred to in these regulations and Revised Statutes 17:361." Id.

17. Section 6 of the BESE regulations sets forth an appeals procedure. A nonpublic school may appeal an audit conducted by either the superintendent of education or the legislative auditor to the Board of Elementary and Secondary Education. Ex. D-3 § 6.

18. Section 7(c) states that "[a] nonpublic school may designate another legal entity to receive the reimbursement

to which said nonpublic school is entitled under the provisions of the required services act by providing the Superintendent of Education with an authorization to that effect from the governing authority of the nonpublic school." Ex. D-3 § 7(c).

19. The BESE Regulations do not make any specific reference to whether reimbursement is allowed for either teacher-prepared or standardized tests.

20. "Instructions for Completing the Required Services Form" (hereinafter "Instructions") are provided by the Louisiana Department of Education to the administrators of nonpublic schools. Exs. D-2 & D-4. "The forms require the school to indicate the number of hours consumed by each type of employee in a particular task and the cost to the school of that employee's time." Ex. D-2, p. 2. Both the required services form and the Instructions have been used by the State "continuously from at least 1980" to the date of trial. Id.

21. The Instructions do not make any reference to reimbursement for either teacher-prepared or state-prepared tests.

22. The Louisiana Department of Education mails the BESE Regulations and a required services form (hereinafter "claim form") once a year to the eligible nonpublic schools. Doc. 265, p. 94.

23. The claim forms are to be filed with the Louisiana Department of Education by September 30 of each year with a grace period to October 15. Id. at 67.

24. The claim form lists all of the categories of mandated administrative expenses for which a nonpublic school may seek reimbursement. The categories include:

(1) pupil attendance reporting;

(2) record maintenance;

(3) nonpublic school annual reports;

(4) transportation;

(5) inspections;

(6) textbooks and supplies;

(7) ESEA Titles I and IV-B;

(8) special education;

(9) testing program;

(10) teacher certification;

(11) continuing education; and

(12) food and nutrition program.

Ex. S-32.

25. The claim form also lists a time "parameter" for each category of mandated administrative expenses for which a nonpublic school may seek reimbursement. Id.

26. The "Reimbursement of Required Costs" statute became effective July 11, 1980. La. Rev. Stat. Ann. §§

17:361-365 (West 1982). In the summer of 1980, a committee of twenty to twenty-five members was formed to make recommendations as to "how the required services law could be implemented." Doc. 254, pp. 35-36, 57. The committee, comprised of both nonpublic school personnel and members of the state Department of Education, did not devise the claim form itself. Id. However, the committee did discuss and make recommendations as to parameters and hours. Id. at 36-37. It is unclear to the Court whether the committee's recommendations were adopted, but time parameters apparently were included on the claim form used at the inception of the required services reimbursement program.

27. Number 4 of the Instructions provided by the Louisiana Department of Education states: "Parameters (maximums) for reporting by function and personnel type are included on the form. The number of hours actually recorded may vary from school to school. If the parameters are exceeded, additional auditing may be required." Ex. D-4.

28. The BESE Regulations do not define "parameters" or make any reference at all to "parameters."

29. Joseph F. Kyle, Deputy Superintendent for Management and Finance in the Louisiana Department of Education from March 12, 1984 to March 14, 1988, testified concerning his department's administration of the nonpublic school reimbursement program. Doc. 264, pp. 86-87. He stated "I don't know what parameters mean" when asked whether he attempted to ascertain if the information contained on the claim forms was within the parameters set forth on the form. Id. at 120.

30. Graig Luscombe, Deputy Superintendent for Management and Finance in the Louisiana Department of

Education at the time of trial, testified that there were two persons in his office directly involved in handling the claims for reimbursement for nonpublic school administrative expenses. Doc. 258, pp. 55, 100-101. Jennings Cleveland, a Fiscal Officer 7 with the Bureau of School Finance and Budget of the Louisiana Department of Education, was specifically responsible for the administration of the reimbursement program. Doc. 265, pp. 61-62; Doc. 264, pp. 127-28; Doc. 258, p. 101. Magdalen Marchiafava was the "staff person who prepares documents to actually cause the flow of the money." Doc. 258, p. 101.

31. Mr. Cleveland testified that the time parameters are "guidelines" for the persons filling out the claim forms. Doc. 265, p. 145. The guideline "is a general consensus of the particular laws in that area . . . and is going to vary from place to place." Id.

32. Mr. Cleveland and Ms. Marchiafava were the only two persons who would question "whether the amount that is claimed falls within what is considered reasonable within the guidelines." Id. at 146, 149.

33. Mr. Cleveland testified that "any local ordinance, any local regulation, any public health regulation, any BESE regulation, anything that would require them to do something" could be used as a basis for a nonpublic school reimbursement claim. Id. at 97.

34. The Bureau of School Finance and Budget of the Louisiana Department of Education does not keep records of all of the local regulations of the 64 parishes of the state. Id.

35. Certain nonpublic schools in Louisiana have filed claim forms with the State with recorded figures that exceed the parameters stated on the forms. Id. Most of these schools

have explained to Mr. Cleveland why the parameters were exceeded. Mr. Cleveland then advised these schools that have exceeded the parameters that if they "leave in [their] files an audit trail that in case this program is ever audited that they can check it that's okay." Id. at 72.

36. The Court finds that the State Department of Education, in processing claim forms under the required services reimbursement program, does not require that the amounts recorded by the nonpublic schools be within the time parameters. Id.

37. Mr. Cleveland spot checks approximately 15 claim forms to see if the math is correct" and then forwards the forms to Ms. Marchiafava, an accounting analyst with the Bureau of School Finance and Budget. Id. at 5, 67, 69.

38. Ms. Marchiafava has instructions from Mr. Cleveland "to take the bottom line and set that up as the amount of the claim." Id. at 67. She enters all of the information on the claim forms into the computer. Id. at 9. Once all of the information is entered into the computer, Ms. Marchiafava arrives at a grand total and she prints "a hard copy." Id. at 20. She compares the hard copies from year to year "to see if there [are] any astronomically large figures or anything that looks strange . . . in the comparison." Id. If she discovers "a figure that has changed significantly," Ms. Marchiafava brings it to Mr. Cleveland's attention. Id. at 21.

39. Ms. Marchiafava noted a discrepancy in the 1989 grand total from the seven schools in the Houma/Thibodaux diocese. Id. at 21. The schools explained the discrepancy to her on the telephone. Id. at 24. Mr. Cleveland reviewed the seven claim forms, before ultimately paying the higher amount claimed. Id. at 25.

40. Ms. Marchiafava recalled a school which had overreported its required costs and so refunded money to the State this year. Id. at 22.

41. Once the legislature makes the appropriation for the nonpublic school reimbursement program, Mr. Cleveland calculates the percentage due each school on a pro rata basis and gives that percentage to Ms. Marchiafava. The computer then generates the amount to be paid to each school. Id. at 11, 69-70.

42. The State currently mails out thirty checks for the nonpublic school reimbursement program. Id. at 19.

43. The Court finds that the Louisiana Department of Education does not check the underlying documents that the nonpublic schools rely on in completing their claim forms, does not check the claim forms to determine whether the amounts claimed are within the parameters listed, and does not attempt to verify the information contained on the claim forms. Id. at 72-73; Doc. 264, p. 120.

44. For the 1988-89 school year, the Louisiana legislature appropriated approximately $3,587,000 for the nonpublic school reimbursement program. These funds were paid out by October 31, 1989. Doc. 265, pp. 103-104.

45. For 1988 and 1989, the State reimbursed the nonpublic schools for approximately 24% of the expenditure amounts which the schools claimed. The Louisiana legislature did not appropriate sufficient funds for full reimbursement. Id. at 143.

46. Since the 1984-85 school year, the Louisiana Department of Education has not reimbursed any eligible, approved, nonpublic school for more than 50% of the

amount requested by the school. Doc. 336, p. 74, Stip. Fact 59.

47. Leonard J. Fine, formerly Assistant Superintendent for Business Management of the Department of Education of the Archdiocese of New Orleans, prepared an undated memorandum to assist the schools operating under the auspices of the Archdiocese in completing their claim forms (hereinafter "Fine memorandum"). Exs. P-292; D-1. The Fine memorandum describes in detail the activities which are included in each of the twelve categories specified in the claim form. His information "was taken directly from the state department's issuance of the categories and what would fall under each of those categories." Fine 9/16/87 dep., p. 172.

48. Category 9 "Testing Program" was described in the Fine memorandum as follows: "Selecting test; determining number of tests; ordering; administering; returning for grading; follow-up questionnaire; interpreting; recording." Ex. P-292, p. 5. This language was identical to language used by the State with the exception of the addition of "follow-up questionnaire." Fine 9/16/87 dep., p. 173. Any changes made by Mr. Fine "were made after a consultation with the state department." Id. at 174. There was no reference to either state-prepared tests or teacher-prepared tests in the Fine memorandum.

49. On March 23, 1981, John C. Rice, Jr., Associate Superintendent for Government Programs, Louisiana Catholic Conference, prepared a memorandum to Catholic Administrators to assist them in completing the "Required Services Report." Ex. P-304. The description of Category 9 "Testing Program" was identical to the description in the Fine memorandum.

50. In the case of forms completed by the parochial schools operated within the Archdiocese of New Orleans, the principals of the individual schools send the forms to the Archdiocese of New Orleans Office of Education, which collates the completed forms and sends them to the Louisiana Department of Education with a cover sheet indicating the claims submitted by each school. Fine 9/16/87 dep., pp. 174-175.

51. The Louisiana Department of Education annually mails to the Office of Education of the Archdiocese one check equal to the sum of all reimbursement payments to be made to Catholic schools operated within the Archdiocese, along with a printout indicating the reimbursement amount due each school. The Archdiocese then pays each school the reimbursement amount indicated on the printout. Id. at 175, 183-84.

52. Marie K. Cannon, the principal of St. Anthony School in Gretna, Louisiana, testified that her school participated in the nonpublic school required services program. The reimbursement monies went to the pastor of St. Anthony Parish. Ms. Cannon, however, was responsible for the preparation of the claim and for submission of the claim for reimbursement. Doc. 260, pp. 54-56.

53. Ms. Cannon stated that at the beginning of the school year, the forms are presented to the faculty and explained to them. Id. at 56. She collects the claim forms every quarter, and then issues new forms to the teachers for the next quarter. At the end of the school year, Ms. Cannon works with a committee to compile the results and fill out the required claim form. Id.

54. Ms. Cannon testified that the testing program which was included for reimbursement on the claim form was the

standardized test of the Science Research Associates. Id. at 79.

55. Ms. Cannon stated that all of the quarterly logs received from the teachers and all of the reports dating back to the early 1980s are maintained in her office. Id. at 90. She noted that no one from the State or the legislative auditor's office had ever come to her school to review the supporting documents. Id. at 65.

56. Alvin Murphy, President of Archbishop Chapelle High School in Metairie, Louisiana, an all-girls high school operated under the auspices of the Archdiocese, indicated that his school participates in the nonpublic school required services reimbursement program. Doc. 254, pp. 5, 32.

57. Mr. Murphy testified that for the seven years that he has been principal and president of Archbishop Chapelle, no one from the State, the parish, the legislative auditor's office, or the Office of Education of the Archdiocese has ever visited the school to review the supporting documents. Id. at 41-43.

58. The Archdiocese receives the reimbursement funds from the State and then forwards the reimbursement funds to the individual schools. Once Mr. Murphy receives the funds, he deposits them into the general account of the school. Id. at 46.

59. Andrew Campbell, principal of St. Angela Merici School in Metairie, Louisiana, testified that his school participates in the required services reimbursement program. Doc. 251, pp. 4-5, 56.

60. The reimbursement funds received from the State were deposited into the general account of St. Angela Merici School. Id. at 57.

61. No one from the State or the Archdiocese has ever come to St. Angela Merici to review or audit the records substantiating the hours submitted on the claim forms. Id. at 61.

62. Thomas Becker, the principal of St. Agnes School in Jefferson, Louisiana, testified that St. Agnes participates in the nonpublic school reimbursement program. Doc. 252, pp. 16-17.

63. No one from the State Department of Education or the Archdiocese has ever visited St. Agnes to review the documentation supporting the claim forms submitted by the school. Id. at 21.

64. Mr. Cleveland has been involved in administering the reimbursement program since 1980 when the program started. Doc. 265, pp. 70-71. He testified that there is "no audit staff in the Department of Education . . . [and] one auditor for over a $2,000,400,000 budget." Id. at 99. The reason why no audit had taken place was because of "lack of staff." Id.

65. Although La. Rev. Stat. Ann. § 17:365 and BESE Regulation § 5(a) authorize an audit of vouchers or other documents by the Superintendent of Education, the Court finds that no such audit by the Superintendent of Education has ever taken place.

66. Joseph Burris, the State Legislative Auditor at the time of his deposition on June 22, 1989, who had served in that capacity for seventeen years, testified that none of his staff

auditors had engaged in any auditing at the site of any of the nonpublic schools in the state during the five years preceding his deposition. Burris dep., p. 11.

67. Although La. Rev. Stat. Ann. § 17:365 and BESE Regulation § 5(b) make provisions for an audit by the legislative auditor, the Court finds that no audit of the accounts and records of the nonpublic schools has been conducted by the State Legislative Auditor since at least 1984.

68. The Court finds that the principals of the nonpublic schools generally verified the accuracy of the reimbursement claim forms themselves.

CONCLUSIONS OF LAW

1. The United States Supreme Court has had two required services programs before it for its review: *Levitt v. Committee for Public Education, 413 U.S. 472, 37 L. Ed. 2d 736, 93 S. Ct. 2814 (1973),* and *Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1980).* In Levitt, the Court held unconstitutional the statute under review. In Regan, the Court held the statute to be constitutional.

2. In Levitt, the New York statute under review reimbursed nonpublic schools

> for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the

state of various other reports as provided for or required by law or regulation.

413 U.S. at 474.

3. In Levitt, the nonpublic schools were reimbursed for both state-prepared examinations and traditional teacher-prepared tests. *Id. at 475.* The greatest portion of the funds paid the nonpublic schools under the statute was for reimbursement for the testing of the students. *Id. at 478.*

4 The Levitt Court found significant that no attempt was made under the statute and no means were available "to assure that internally prepared tests are free of religious instruction." *Id. at 480.* Since the State failed to assure that the testing was "not being used for religious indoctrination," the Court concluded that the reimbursement statute constituted "an impermissible aid to religion . . . ." Id. This was so "because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." Id.

5. The Levitt Court noted that the State is not permitted to reimburse nonpublic schools "for any activity 'mandated' by state law or regulation." *Id. at 481.* Rather, "the essential inquiry in each case, as expressed in our prior decisions, is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution." Id. The Establishment Clause is not to be "read as permitting a State to pay for whatever it requires a private school to do." *Id. at 482.*

6. Thus, in Levitt, "the inherent teacher discretion in devising, presenting and grading traditional tests, together with the failure of the legislature to provide for a method of

auditing to ensure that public funds would be spent exclusively on secular services, disabled the enactment from withstanding constitutional scrutiny." *Regan, 444 U.S. at 650.*

7. In *Wolman v. Walter, 433 U.S. 229, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977),* the Supreme Court sustained an Ohio statute which authorized the expenditure of state funds "to supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." *Regan, 444 U.S. at 653.* In Wolman, the tests were drafted and graded by state personnel, and were administered by nonpublic school personnel. *Wolman, 433 U.S. at 239.* The Ohio statute did not authorize any reimbursement to nonpublic schools for the costs of administering the tests. Id.

8. The New York legislature enacted a new reimbursement statute after Levitt. The Regan Court upheld this new statute which permitted reimbursement to the nonpublic schools for two categories of services: the administration of state-prepared standardized examinations and the execution Of state-required reporting requirements. *Committee for Public Education & Religious Liberty v. Levitt, 461 F. Supp. 1123, 1125 (S.D.N.Y. 1978),* aff'd sub nom., *Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1980).*

9. The New York statute considered in Regan provided reimbursement to the nonpublic schools both for administering standardized tests and for grading the tests. *444 U.S. at 657.* The statute did not reimburse nonpublic schools for "the preparation, administration, or grading of teacher-prepared tests." *Id. at 652.* The Supreme Court in Regan applied Wolman and took it one step further, allowing the nonpublic schools to be reimbursed for both the costs of

administering "secular" tests and grading of "secular" tests. Id. The Regan Court found that "grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect." Id. However, the Supreme Court left open the possibility that "the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services." *Regan, 444 U.S. at 659.*

10. The Regan Court also found that reimbursement for recordkeeping and reporting services had primarily a secular purpose. *444 U.S. at 656-57.* Between 85% and 95% of the total reimbursement to the nonpublic schools was for attendance reporting. *Id. at 657 n.5.* The Supreme Court found that these ministerial "tasks are not part of the teaching process and cannot 'be used to foster an ideological outlook.'" *Id. at 656-57.*

11. The statute in Regan required the schools claiming reimbursement to submit along with their application for reimbursement "additional reports and documents prescribed by the Commissioner . . . ." *444 U.S. at 659.* In fact, § 4 of the New York statute provides:

> § 4. Application
>
> Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

N.Y. Unconsol. Law ch. 91-C § 4 (1993) (Emphasis added).

12. La. Rev. Stat. § 17:362 virtually tracks the language of § 4 of the New York statute and also requires the nonpublic schools to submit with their reimbursement application "such additional reports and documents as the superintendent may require. . . . ." (Emphasis added). La. Rev. Stat. Ann. § 17:362 (West 1982).

13. The Court finds that La. Rev. Stat. § 17:362, on its face, does not violate the Establishment Clause under the Supreme Court's holding in Regan.

14. La. Rev. Stat. § 17:363 entitled "Maintenance of records" is essentially indistinguishable from § 5 of the New York statute, also entitled "Maintenance of records." Both sections require that each nonpublic school maintain "a separate account or system of accounts for the expenses incurred" and preserve the accounts and records supporting their applications for reimbursement at the school "until the completion of such audit procedures." La. Rev. Stat. Ann. § 17:363 (West 1982); N.Y. Unconsol. Law ch. 91-C § 5 (1993).

15. The Court finds that neither Levitt nor Regan mandate that once the reimbursement funds are received from the State, that they have to be deposited into a separate bank account. Like the statute upheld in Regan, La. Rev. Stat. § 17:363 requires that separate records and accounts be maintained at the nonpublic schools substantiating the services to be reimbursed. *444 U.S. at 659.*

16. The Court finds that La. Rev. Stat. § 17:363, on its face, does not violate the Establishment Clause under the Supreme Court's holdings in Levitt and Regan.

17. Section 17:364 of the Louisiana statute entitled "Payment" and § 6 of the New York statute entitled

"Payment" both require that no funds be paid to a nonpublic school until the application has been approved by the superintendent in the Louisiana statute and by the commissioner in the New York statute. La. Rev. Stat. Ann. § 17:364 (West 1982); N.Y. Unconsol. Law ch. 91-C § 6 (1993).

18. The Court finds that La. Rev. Stat. § 17:364, on its face, does not violate the Establishment Clause under the Supreme Court's holding in Regan.

19. Section 17:365 of the Louisiana statute and § 7 of the New York statute both authorize auditing by two different state departments. The Louisiana statute provides for auditing by the Superintendent of Education and by the Legislative Auditor. The New York statute approves auditing by the State Commissioner of Education and by the State Department of Audit and Control. The procedure for auditing by the Louisiana superintendent, set forth in the first paragraph of § 17:365, is identical to the procedure for auditing by the New York commissioner, set forth in the first paragraph of § 7 of the New York statute.

The second paragraph of both sections, § 17:365 and § 7, both require that any excess monies discovered by audit be returned "immediately" to the State by the nonpublic school.

The only notable difference in the two sections is that the New York department of audit and control "shall from time to time examine" the accounts and records of the nonpublic school, while the Louisiana Legislative Auditor "may from time to time examine" those same accounts and records. The Court does not find this discretion in the duties of the Louisiana Legislative Auditor, pursuant to § 17:365 of the Louisiana statute, to have any constitutional significance, since the Louisiana Superintendent of Education is

commanded by the statute to audit documents "as is necessary to insure that such payment is lawful and proper." La. Rev. Stat. Ann. § 17:365 (West 1982). The audit by the Superintendent of Education, if performed properly, should be sufficient on its own to make certain "that the cash reimbursements . . . cover only secular services." *Regan, 444 U.S. at 651.* If the auditing by the Superintendent of Education is done thoroughly, the audit by the Legislative Auditor can be reserved for unusual situations which demand additional scrutiny.

Thus, the Court finds that § 17:365 of the Louisiana statute contains provisions both authorizing state audits of nonpublic school financial records and requiring the refund of excess reimbursement, two of the concerns highlighted in *Levitt. 413 U.S. at 477.*

20. The Court also finds that the Louisiana statute, like the New York statute in Regan, on its face, "suggests no excessive entanglement. . . ." *Regan, 444 U.S. at 660.* The Louisiana statute, like the New York statute upheld in Regan, allows for a reimbursement process which "is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. Id. In both statutory schemes, separate books are required for the reimbursement and "'the services for which the private schools would be reimbursed are discrete and clearly identifiable.'" Id. Thus, the Court follows the Regan court and finds that any auditing of the records of the nonpublic schools by the State will not result in excessive entanglement.

21. Thus, the Court finds that La. Rev. Stat. § 17:365, on its face, does not violate the Establishment Clause pursuant to Levitt and Regan.

22. The most notable difference between the Louisiana statute and the New York statute upheld in Regan is the number of nonpublic school expenses that are allowed to be reimbursed by the State. Specifically, Section 3 of the New York "Reimbursement of Nonpublic Schools for Expenses of State Programs" allows reimbursement to the nonpublic schools for the actual costs incurred "for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures." N.Y. Unconsol. Law ch. 91-c § 3 (1993).[8]

Section 17:361 allows reimbursement to the nonpublic school for providing school services, maintaining records, and completing and filing reports, which are required by the State or the local school board in 14 specific categories and a category which includes "any other education-related data which are now or hereafter shall be required of such nonpublic school by law, regulation or requirement of a state department, state agency, or local school board." La. Rev. Stat. Ann. § 17:361 (West 1982). These expenses appear to be "highly routinized" and so "costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision." *Regan, 444 U.S. at 660 n.7.*

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[8] Effective July 1, 1985, § 3 of the statute was amended also to allow reimbursement for the actual costs incurred by the nonpublic schools "in meeting the recording and reporting requirements of the state school immunization program." N.Y. Unconsol. Law ch. 91-C § 3(b) (1993).

23. Plaintiffs have failed to identify, and the Court is not aware of, any law, regulation or requirement of any Louisiana state department, state agency, or local school board that requires the preparation or ordering of materials used in religion classes or to teach religion to children enrolled in parochial schools.

24. Since the statute limits the reimbursable expenses to these 14 specific categories and only "education-related data" which is or will be mandated by the State or local school board, the Court finds that the listed reimbursable activities "are discrete and clearly identifiable." *Regan, 444 U.S. at 660.*

25. The Court finds that La. Rev. Stat. § 17:361, on its face, does not violate the Establishment Clause pursuant to Levitt and Regan.

26. The Louisiana reimbursement statute, unlike the New York statute, does not include the legislative purpose in the language of the statute. However, the Court finds that the Louisiana statute also has the secular purpose of providing "educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century." N.Y. Unconsol. Law ch. 91-C § 1 (1993); *Regan, 444 U.S. at 654.*

27. The Court finds that the Louisiana statute on its face provides only that the actual costs incurred by the approved schools for record-keeping and for providing required services may be reimbursed upon application to the State Superintendent of Education.

28. The Court finds that the auditing procedures and other safeguards included in the Louisiana statute do not involve excessive entanglement, just as the Regan court found that

the New York statute did not suggest excessive entanglement on its face. *Regan, 444 U.S. at 660.* The Regan court described the process of reimbursement:

> Schools which seek reimbursement must 'maintain a separate account or system of accounts for the expenses incurred in rendering' the reimbursable services, and they must submit to the N.Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner . . . . Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attributable to administration of the examinations and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims . . . . The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately . . . . (citations omitted)

444 U.S. at 659-60 (quoting *461 F. Supp. at 1126* (quoting N.Y. Laws, ch. 507)).

29. Since the reimbursement process set forth in the Louisiana statute, like the New York statute, is "straightforward and susceptible to the routinization that characterizes most reimbursement schemes," the Court finds that on its face, the Louisiana statute does not suggest any excessive entanglement. *Regan, 444 U.S. at 660.*

30. The Louisiana required services reimbursement statute, which declares that nonpublic schools may receive reimbursement only after state officials review and approve state-prescribed application forms submitted by the nonpublic schools, La. Rev. Stat. Ann. §§ 17:362, 364 (West 1982), and that nonpublic schools must maintain documents supporting their claims in a separate account and are subject to periodic audits by the state, id. §§ 17:363 & 365, on their face provide "effective means for insuring that the cash reimbursements would cover only secular services." *Regan, 444 U.S. at 659.*

31. Because of the safeguards included in the Louisiana statutory scheme which should insure that only secular services are reimbursed, the Court finds that the absence of "an express limitation" on the use of the reimbursement funds for religious purposes does not establish that the Louisiana Reimbursement of Required Costs statute on its face has the primary effect of advancing religion. *Bowen v. Kendrick, 487 U.S. 589, 615, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988).* The Bowen Court noted that the Supreme Court has "never stated that a statutory restriction is constitutionally required." *Id. at 614.*

32. The Regan Court noted that the Supreme Court has not accepted the "freeing-up" argument advanced by the plaintiffs: "'that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" *Regan, 444 U.S. at 658* (quoting *Hunt v. McNair, 413 U.S. 734, 743, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)).* In *Roemer v. Maryland Public Works Bd., 426 U.S. 736, 747, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976),* quoted in, *Regan, 444 U.S. at 658 n.6,* the Court stated:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State

> frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

33. The Court thus finds that the Louisiana statute, La. Rev. Stat. §§ 17:361-365, is constitutional on its face.

34. Turning to the as-applied challenge, the plaintiffs contend that the reimbursement program's current set-up does not ensure that only state prepared tests and not teacher prepared tests are included, that the reimbursement funds will be used only for secular services, and that only the "actual costs" in the meeting of state obligations are reimbursed. Plaintiffs argue that either the aid will result in the advancement of religion because of the failure to adequately monitor its use, or due to the necessary monitoring, excessive entanglement will result.

35. Plaintiffs emphasize that the New York reimbursement plan in Regan involved tests that were prepared by the State, and were administered on the premises by personnel of nonpublic schools. *444 U.S. at 654.* The nonpublic schools were found by the Court to have no control over the content of the tests. Id. Although some of the state prepared tests were graded by nonpublic school personnel, it was determined that in view of the nature of the tests, which dealt only with secular academic matters, the grading by nonpublic school employees afforded no control by the nonpublic school over the outcome of any of the tests, leaving no risk that the state prepared tests could be used for religious educational purposes. *Id. at 657.*

36. In *Zobrest v. Catalina Foothills School District, 125 L. Ed. 2d 1, U.S. , 113 S. Ct. 2462, 2463 (1993),* the Supreme Court held that the school district's provision of a sign-language interpreter to a disabled child enrolled in a pervasively sectarian school to facilitate his education did not violate the Establishment Clause. The Court found that "when the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,'" providing this service does not offend the Establishment Clause. Id. at 2467.

37. The Court finds that the administration of the Louisiana required services statute by the Louisiana Department of Education does not provide adequate assurance "that the cash reimbursements would cover only secular services." *Regan, 444 U.S. at 659.*

38. The Court finds that the Louisiana Superintendent of Education and the Board of Secondary and Elementary Education are not administering the reimbursement program as set forth in La. Rev. Stat. §§ 17:361-365 for the following reasons: the Superintendent of Education and the Legislative Auditor have failed to conduct an audit of the documents and accounts of the nonpublic schools within the last five years; the Superintendent of Education has failed to check the claim forms for substantive content, rather than just checking the forms for mathematical accuracy; the Superintendent of Education has failed to require the nonpublic schools to submit additional reports and documents to support applications for reimbursement which exceed the parameters; the BESE regulations have failed to define "parameters" and to implement a procedure to be used to determine whether an expense falls within the acceptable parameters; and the BESE regulations have failed to limit reimbursement specifically to state-prepared tests and not

teacher-prepared tests. The safeguards set forth in La. Rev. Stat. §§ 17:361-365 to ensure that the reimbursement to the nonpublic schools is only for secular services have not been implemented. According to Levitt and Regan, this Court must be certain that the reimbursement provided by the State does not directly aid religious education, and that the reimbursement is for tasks that have "a secular purpose and primarily a secular effect." *Regan, 444 U.S. at 657.*

39. The Court thus finds that the Louisiana Reimbursement of Required Costs statute, La. Rev. Stat. Ann. §§ 17:361-365, as presently applied by the Louisiana Superintendent of Education and the Board of Elementary and Secondary Education, violates the Establishment Clause.

III. THE JEFFERSON PARISH SCHOOL BOARD'S BUS TRANSPORTATION PROGRAM

A. WHETHER THE TRANSPORTATION PROGRAM WHICH PROVIDES FOR SEPARATE TRANSPORTATION OF PUBLIC AND NONPUBLIC SCHOOL CHILDREN IN JEFFERSON PARISH IS UNCONSTITUTIONAL IN ITS APPLICATION.

B. WHETHER THE TRANSPORTATION PROGRAM RESULTS IN EXCESSIVE ENTANGLEMENT.

FINDINGS OF FACT

1. Plaintiffs challenge the State of Louisiana's school transportation statute, La. Rev. Stat. § 17:158, as applied in Jefferson Parish, Louisiana.

2. La. Rev. Stat. § 17:158 now provides, in pertinent part:

> A. (1) Each parish and city school board shall provide free transportation for any student attending a school of suitable grade approved by the State Board of Elementary and Secondary Education within the jurisdictional boundaries of the parish or school board if the student resides more than one mile from such school.
>
> . . .
>
> (4) . . . However, nothing in this Section shall prohibit a parish or city school from entering into contracts or mutual agreements for providing school bus transportation.

La. Rev. Stat. Ann. § 17:158 (West Supp. 1994) (Emphasis added).

3. The statute applies to all "eligible public and nonpublic school students." La. Rev. Stat. Ann. § 17:158(F) (West 1982).

4. Act 1992, No. 24, entitled "Schools - Free Transportation for Students," became effective May 25, 1992. The purpose of this Act was:

> to amend and reenact R.S. 17:158(A)(1) and (C) and to enact R.S. 17:158(H), relative to school transportation; to provide for the free transportation of certain students living more than one mile from school; to provide for exceptions; to provide limitations; to provide for the duties and responsibilities of the state superintendent of education and the State Board of Elementary and Secondary Education; to provide for the duties and responsibilities of city and parish school boards and

certain board officers and employees; and to provide for related matters.

1992 La. Sess. Law Serv. Act No. 24 (West 1992) (Emphasis added).

5. La. Rev. Stat. § 17:158 was amended after the trial of this matter. At the time of trial, the statute only required the local school board to provide transportation to all eligible public and nonpublic school students. In 1992, the statute was amended to require that the local school board provide free transportation to all public and nonpublic school students.

6. The Court finds that § 17:158(A), as amended, now mandates that no fee can be charged to any eligible student, public or nonpublic school, for transportation by the local school board. This is a significant change from the language of the statute which was applicable at the time of the trial.

7. La. Rev. Stat. § 17:158(H)(1) provides that "no parish or city school board shall eliminate or reduce the level of transportation services provided to students as required by the provisions of this Section except for economically justifiable reasons approved in accordance with the provisions of this Subsection by the State Board of Elementary and Secondary Education." La. Rev. Stat. Ann. § 17:158(H)(1) (West Supp. 1994).

8. If the local school board claims that it has "economically justifiable reasons" to eliminate or reduce the level of transportation services to students, then the local school board has to submit detailed financial information to the State in support of its request. La. Rev. Stat. Ann. § 17:158(H)(2)(a)-(e). In addition, the chief transportation officer of the school system, the local superintendent of

schools, and the presiding officer of the school board must attest to a written statement "that the proposed reduction in or elimination of transportation services to students does not have a disparate impact on any group of students by reason of race, creed, sex, handicap, residence, or school attended, whether public or approved nonpublic, elementary or secondary." La. Rev. Stat. Ann. § 17:158(H)(2)(f) (Emphasis added).

9. The Court finds that § 17:158(H), a subsection added in 1992, requires that any reduction or elimination of transportation services by the local school board must apply equally to both public and nonpublic school students, elementary and high school students. There can be no "disparate impact" on one group when transportation services must be reduced or eliminated because of financial problems. Id.

10. The Court finds that § 17:158(H) sets forth detailed guidelines for the local school board to follow if the local school board seeks to reduce or eliminate transportation services. The State Board of Elementary and Secondary Education will review and consider any request by a local school board for approval to reduce or eliminate transportation services that is in compliance with the requirements of § 17:158(H), "however no such approval shall be granted by the Board until the State Superintendent of Education has certified the accuracy and validity of the information submitted by the parish or city school board." La. Rev. Stat. Ann. § 17:158(H)(3). The local school board must submit detailed information to the State, which the State will then certify for accuracy and validity, in order to receive permission to curtail services. It is obvious to the Court that the intent of Subsection H is to ensure that the local school board has legitimate financial concerns when it

recommends elimination or reduction in student transportation services.

11. Plaintiffs argue that the Jefferson Parish School Board has established and maintained a transportation system segregating students on bus routes according to the schools they attend, thus separating public from nonpublic school children. Plaintiffs contend that this practice violates the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment, as well as by reason of the equal protection requirements of the Fourteenth Amendment.

12. Plaintiffs claim that the Jefferson Parish School Board has not made a good faith attempt to maximize the number of bus routes where both public and nonpublic school students are jointly served on the same buses in keeping with the safe, efficient and economical operation of the School Board's transportation program.

13. Plaintiffs also maintain that the Archbishop of New Orleans and other administrators and staff of Catholic schools located within Jefferson Parish have been directly involved in the establishment of the transportation program for public and nonpublic school students from the 1985-86 school year through the 1989-90 school year.

14. The Jefferson Parish School Board (JPSB) is a political subdivision of the State of Louisiana that is vested with the authority to direct the operations of the Jefferson Parish Public School System (JPPSS), subject to the rules and regulations promulgated by the Board of Elementary and Secondary Education (BESE). Doc. 336, p. 69, Stip. Fact 18.

15. During the 1989-90 school year, the JPPSS transported approximately 41,862 students by school bus, of which

35,715 were public school students ana 6,147 were nonpublic school students. Doc. 277, p. 93.

16. The 1989-90 school bus ridership for the Jefferson Parish Schools was 85.6% public school students, 12.4% Catholic in-district students, 1.4% Catholic out-of-district students, and .5% Lutheran students. Ex. D-47.

17. The geographic boundaries of the Jefferson Parish Public School System are contiguous with those of Jefferson Parish. Doc. 267, p. 80.

18. Jefferson Parish is twelve miles wide. Doc. 264, p. 46.

19. To be eligible for JPPSS transportation, both public and nonpublic school students must be bona fide residents of Jefferson Parish, must attend a state-approved school located within Jefferson Parish, and must reside more than one mile from their school. Exs. S-18, p. 21; S-19, p. 21; P-334.

20. The JPPSS does not transport any nonpublic school students outside of Jefferson Parish. Nor does the JPPSS transport any public school students outside of Jefferson Parish, except for certain special education students living in Grand Isle. Doc. 267, p. 80.

21. The transportation area is the geographic area "within which transportation service is provided to specific schools." Doc. 276, p. 36. The attendance area includes "the transportation area plus any pedestrian walk zones and/or any areas that [the JPPSS does] not provide transportation from to a specific school." Id.

22. George F. Home is the Assistant Superintendent for Planning and Transportation of the Jefferson Parish Public School System. Doc. 262, p. 93. He has held that position

since January 1987. Id. In that capacity, he has been principally responsible for establishing school attendance districts and for overseeing the operation of the JPPSS bus transportation system. Id. Approximately sixty percent of his time is spent administering the transportation system and forty percent of his time is spent in the planning department. Id. at 87.

23. Mr. Home is certified to teach fleet motor vehicle courses and the National School Bus Transportation course. Doc. 273, p. 99. He is a member of the National Association of Pupil Transportation, and is a member and past president of the Louisiana Association for School Transportation Officials. Id. He has also "served as a consultant to the Tangipahoa Parish school system in matters related to bus routing, time schedules." Id. at 100. He has also served as an expert witness in state court on matters related to "transportation safety and routing buses." Id.

24. The Court finds, that Mr. Home has considerable experience in the field of school bus transportation.

25. Two editions of the "Procedure Manual for the Division of Planning and Transportation of the Jefferson Parish Public School System" were applicable effective with the 1988-89 school session. Ex. S-18, p. iii. The First Edition which was revised in August 1988 (Ex. S-18) (hereinafter "First Edition") was to be used by the public schools. The Second Edition which was revised in August 1988 (Ex. S-19) (hereinafter "Second Edition") was to be used "by non-public schools receiving transportation services through the public school system and non-public schools receiving special education teachers and assistants." Ex. S-18, p. iii. (Emphasis added).

26. According to the Foreword of the First Edition, the responsibilities of the JPPSS Transportation Department (hereinafter "Transportation Department") are "to seek and train responsible individuals to serve as full-time and substitute drivers and as special education bus attendants, to develop school time schedules and to design school bus routes for transporting safely more than 50,000 students twice a day." Id.

27. JPPSS transportation of students attending nonpublic schools located in Jefferson Parish is governed by the "Nonpublic School Transportation Policy," adopted by the Jefferson Parish School Board, revised on June 1, 1989, and set forth in the Second Edition. Ex. S-19, pp. 21-23.

28. The JPPSS establishes the transportation schedules and starting and ending time schedules for all public and nonpublic schools located in Jefferson Parish that have students who receive transportation services from the JPPSS. Doc. 336, p. 69, Stip. Fact 21; Ex. S-19, p. 21.

29. All of the Catholic schools in Jefferson Parish operated by the Archdiocese of New Orleans participate in the transportation program provided by the Jefferson Parish School Board. Doc. 264, pp. 83-84. The Jefferson Parish School Board sets the starting times for all of the Archdiocesan schools in Jefferson Parish. Id. at 84; see Ex. S-23.

30. The JPPSS generally designs its school bus routes to be "unique" routes -- i.e., each bus route services a single school. Doc. 261, p. 34. The JPPSS assigns one school per bus for both public and nonpublic schools. Doc. 267, p. 84. There are "virtually no instances" where two schools are serviced on the same route, "whether it was two public schools serviced on a route, two Catholic schools serviced on

a route or public and a Catholic school serviced on a route." Doc. 261, p. 34.

31. This policy of unique routes applies to all school bus routes operated on behalf of the JPPSS, regardless of whether the students served attend a public school or a nonpublic school. Doc. 267, p. 84.

32. Mr. Horne testified that "it is administratively easier if we have fleets of buses assigned to these various schools so that we reduce the number of buses serving them." Id. at 85. Some of the reasons Mr. Horne presented to support the practice of one school per bus were: time coordination, distance between schools, different lengths of school days, waiting time of students for the buses, flexibility in assignments, less cost, and more efficiency. Id. at 85-86.

33. The Jefferson Parish School Board's policies governing student transportation permit JPPSS transportation planners to employ "combination routes" -- i.e., routes that simultaneously transport public school students and nonpublic school students to their schools -- where this is economically and logistically feasible. Id. at 35-37, 100-03.

34. A combination route services several different locations or individuals on the same bus. Doc. 269, pp. 33-34. It is a route "in which students from more than one school can be drawn to a single bus and that single bus would drop off those students at each of those two schools." Id. at 124.

35. Combination routes are those routes upon which students who attend different schools are transported on the same bus at the same time. Doc. 336, p. 70, Stip. Fact 26.

36. The 1985 edition of "Standards for School Buses and Operations," the "Bible for transportation," does not specifically refer to combination routes. Ex. P-784; Doc. 274, p. 84.

37. The JPPSS has not "historically" attempted to combine routes to the extent possible. Mr. Horne testified:

> We to the extent possible have not combined the routes. When it is judicious to do so, in our opinion, because of having extra space and students needing transportation and we can't justify having an additional bus, then we do but as a matter of principle trying simply to combine routes we feel that there are some other overriding concerns that we need to address.

Doc. 267, p. 96.

38. Dr. Russell Protti, the former Superintendent of Schools, Jefferson Parish Public School System, testified that there has been no attempt by the JPPSS to have public and nonpublic school children riding on the same bus. Doc. 262, p. 72.

39. The factors that the JPPSS would consider before combining public and nonpublic students on the same bus are: the cost, "the length of time the students ride the bus, how long they have to be on the campus before and after school, what time frames are available for us to transport them and whether or not additional buses would be required." Doc. 267, pp. 105-06.

40. The Transportation Department has never conducted a study to determine whether combination routes of public and nonpublic schools that are in close proximity would increase

the operational costs and the number of buses traveling to those schools. Id. at 107.

41. Plaintiffs' expert, George Donn, has been the Director of Transportation for the Washington County Board of Education in Hagerstown, Maryland since 1975. Doc. 269, p. 4. He also served as the Assistant Supervisor of Transportation for the Prince George's County public school system from 1965 to 1973. Id. at 5. Mr. Donn has been a member of the National Association for Pupil Transportation since 1975 and has served as its president. Id. at 7-8.

42. The Court finds that Mr. Donn is well qualified to testify as an expert with respect to student bus transportation generally and the feasibility of combination routes in Jefferson Parish.

43. Steven Rittvo, the president of Urban Systems Associates, Inc., is a transportation engineer and planner. Doc. 276, pp. 43-44. His company is the traffic and transportation engineer for the Orleans Parish School Board. Id. at 50. Although the Court was impressed with Mr. Rittvo's experience in the transportation field, the Court notes that Mr. Rittvo's experience is not directly related to the scheduling and routing of school buses. Id. at 54.

44. Mr. Donn testified that combination routes can be designed either to increase or to decrease riding time, depending on the objectives of the Transportation Department. Doc. 277, p. 56. The service area for each bus can be decreased and the distance reduced by dividing up the geographical area for each bus and serving two schools. Id. at 62. For a combination route, "each bus only has to cover half of the area to get its capacity." Id. at 63. Mr. Donn testified that this approach should reduce both time and

mileage, while increasing the ridership of the bus. Id. at 62-63.

45. Mr. Donn analyzed two major factors to determine whether a combination route is feasible: comparable geographical attendance areas and close proximity of the schools. Doc. 269, pp. 37-38, 57. Close proximity between schools is different in each case; there is no uniform definition of close proximity. Id. at 123.

46. Mr. Donn testified that in most instances combination runs decrease the number of buses used because more children are served and so there is usually better utilization of the equipment. Doc. 269, pp. 39-40. He also stated that combination runs "sometimes reduce[] the time because the time the bus is going to cover in a geographical area is going to be less than trying to duplicate the whole area . . . ." Id. at 40.

47. One of the reasons presented by Mr. Horne for not implementing combination routes in Jefferson Parish was the potential for discipline problems because of sports rivalries between different schools. Doc. 273, pp. 111-112. Administrative problems could result in "the handling of the discipline procedure with the administrations of two separate schools . . . ." Id. at 112.

48. A principal requested that a combination route in Jefferson Parish between a public school and a nonpublic school be eliminated because of "the behavior of the students and the subsequent administration of the discipline policy with regard to those problems." Doc. 276, p. 39. The JPPSS did not conduct an independent investigation of the problem. Id. at 39-40.

49. Mr. Donn testified that to handle discipline problems on school buses, many transportation systems have implemented "some type of standardization of discipline relative to what is expected of students and . . . try to keep it as simple as possible and that is for the youngsters to get on the bus, take their seat, face forward and talk in a conversational tone." Doc. 277, p. 54. To handle discipline problems involving children from different schools, Mr. Donn testified that it is necessary to work with the school administrators and if needed, schedule "joint parent conferences in some instances." Id. Each situation has to be analyzed on its own merits. Id.

50. A "Bus Student Discipline Procedure" is already set forth in both the First Edition and the Second Edition of the "Procedure Manual for the Division of Planning and Transportation of the Jefferson Parish Public School System." Ex. S-18, pp. 52-55; Ex. S-19, pp. 15-18. These discipline procedures apply to both public and nonpublic school students. The Court agrees with Mr. Donn that a workable procedure could be implemented by the JPPSS to address any possible discipline problems involving bus riders from different schools.

51. Mr. Donn testified that in his county he serves the elementary schools "as individual schools separately . . . [and puts] the middle and high school students on the same bus." Doc. 269, p. 34. When a fifth grade or a middle school is located in close proximity to an elementary school consisting of kindergarten through fourth grade, the bus will drop off the students at the elementary schools and "then go down the street and . . . drop off the fifth grade." Id. If the elementary school is not in close proximity to the middle school, Mr. Donn would "move the fifth grade onto the middle school bus and serve it in that capacity." Id. at 35.

52. Mr. Donn does not combine elementary and high school students on the same bus in his school district, except for special education students. Id. at 110.

53. Capacity in the school bus industry is based on "rump room." Id. at 49. There are "three-three" seats which allow three persons on each side "thirteen-inch rump room," and there are "three-two seats" which allow two persons on one side fifteen inches of rump room and three persons on the other side fifteen inches of rump room. Id. The "three-three" seating is used more in the elementary schools, and the "three-two" seating is used more for high school students. Id. The Court finds that more elementary school students can be seated on a school bus than high school students because of the difference in "rump room." Id. at 49-50.

54. Mr. Donn testified that on a 66 passenger bus, he would normally attempt to have a minimum of 50 elementary school students as passengers. Id. at 50-51. For high school students, the minimum is approximately 44 passengers on a 66 passenger bus. Id. at 51. The number of middle school passengers on a bus depends on whether the students are in the fifth grade or upper grades. Id.

55. On a sixty-six passenger bus, no more than sixty-six students, excluding high school students, "could be appropriately accommodated." Doc. 276, p. 156. As to the number of high school students on a sixty-six passenger bus, Mr. Rittvo "would be comfortable with forty-four although at times [he has] seen it go higher than that." Id.

56. The policy of the Transportation Department of the JPPSS is to have a minimum of forty students attending the nonpublic schools per bus route. This applies to both elementary and high schools. Doc. 267, p. 94; Ex. S-19, p.

22. This policy statement does not apply to the public schools. Doc. 267, p. 94.

57. Neither the State of Louisiana nor the JPPSS has any policy that permits or authorizes the segregation of school children on publicly funded school buses on the basis of religion or race.

58. JPPSS Department of Transportation personnel do not seek or obtain any information concerning the religion of the children transported on JPPSS, and the religion of the students is "never" taken into account by the JPPSS in designing the bus routes or assigning the bus routes. Id. at 84.

59. Whether the school is public or nonpublic is not a factor in the assignment of bus drivers. Drivers employed by the JPPSS may transport students attending a public school on one of their routes, and then transport students attending a nonpublic school on another route, or vice-versa. Doc. 336, pp. 69-70, Stip. Fact 25; Doc. 266, pp. 75-76.

60. Non-Catholic students are enrolled in Catholic elementary and high schools located in Jefferson Parish, and non-Catholic teachers teach in Catholic elementary and high schools located in Jefferson Parish. Ex. S-34, p. 2.

61. The vast majority of the approximately 7,000 Catholic school-age children residing in Jefferson Parish who were not enrolled in Catholic elementary or high schools from 1985 to 1990 attended Jefferson Parish public schools, and some of those Catholic children were transported to their public schools on Jefferson Parish school buses. Id. at 1.

62. The testimony of an administrator of a Catholic high school located within Jefferson Parish was that he had no

objection to his students being transported on the same bus with public school students. Doc. 254, pp. 26-27. It was his opinion that the establishment of such combination routes would be a good arrangement. Id. at 28. His opinion was "based on the fact that if this can provide greater service to the students and to the parents in going to and from school that it would be good. It would eliminate traffic in Jefferson Parish. It would eliminate the possibility of accidents before and after school. It would increase the safety factor throughout. It would accommodate parents of all school children . . . ." Id.

63. The Transportation Department considers the following factors in arranging the routing and scheduling of the school buses for the school year:

> Length of school day, numbers of students to be transported, where the students live, student density, the time schedule of the school beginning and ending, the grade organization of the school, the traffic conditions on the way to and from school, the postschool activities that may be required at the schools, that is, extracurricular activities, athletics and so forth for the schools, the types of facilities that are available for those purposes at the schools . . . Distance and time is [sic] used in the assignment of routes and drivers, not in the development of routes for specific schools.

Doc. 266, p. 69.

64. The bus driver establishes the route that he is going to travel taking into consideration the state guideline "that unless there is a safety factor that would dictate otherwise they are supposed to begin from the fartherest [sic] distance from the school picking the students up and proceed on in safely to the school." Doc. 267, p. 110-11. The

Transportation Department then reviews the route and makes any necessary changes. Id. at 111.

65. Since Mr. Horne has been involved in transportation at the Jefferson Parish Public School System, the Transportation Department has never attempted "to basically throw out the past routing arrangement and start from scratch to . . . come up with a more efficient arrangement." Doc. 275, p. 27.

66. The routing and scheduling of school buses are guided by three concepts: safety, efficiency, and economy. Doc. 269, pp. 30, 119. Safety is more important than efficiency and economy. Id. at 122.

67. School buses are "the safest form of motor transportation on the road today." Id. at 53.

68. After safety, efficiency, and economy, other important factors are the number of students to be transported and the location of the schools. Id. at 120.

69. The policy of the Jefferson Parish School Board is "that no bus route is to be longer than an hour and a half and that it is desirable that special ed. children on the bus are an hour or less." Doc. 276, p. 145.

70. The average bus route in Jefferson Parish, excluding the special education bus routes, is "in the twenty-five to thirty-minute range. Id. However, "some are exceedingly long and some are significantly shorter . . . ." Id.

71. Special education students comprise approximately 4% of the total ridership on the buses. Id. at 28.

72. JPPSS has staggered the starting times of schools located within the district since at least 1975. Doc. 336, p. 69, Stip. Fact 22.

73. Staggering starting times involves placing different schools at different starting times in order to allow a bus to serve more than one group of children. Doc. 269, pp. 31-32.

74. Staggering the starting times for schools "has become almost a universally acceptable way of handling" a transportation program. Id. at 32. They are used widely in the pupil transportation industry. Id.

75. The purpose of staggering school starting times is to enable the JPPSS to assign multiple bus trips, or "routes," to school bus drivers. Doc. 273, pp. 105-06. Such "multitripping" permits the Jefferson Parish Public School System to "transport more students, serve more schools with the same size fleet of buses." Id. at 106.

76. By multitripping the JPPSS is "able to keep the length of the ride time down" for most of the schools serviced. Id.

77. The use of multitripping reduces the fixed overhead expense of the transportation system because it reduces the number of bus drivers and buses that must be employed to transfer the students. Id. at 107-109.

78. Out of the 64 parishes and two city systems in Louisiana, Jefferson Parish has been "rated as either one, two, or three in the number of students per bus and the number of routes per bus and the cost per student," since approximately 1978 by the Louisiana Department of Education. Doc. 267, p. 86.

79. The Court finds that the Jefferson Parish Public School System's use of multitripping is an efficient, economical use of resources for the transportation program.

80. During the 1989-90 school year, JPPSS employed 326 bus drivers who drove approximately 1,150 bus routes. Doc. 262, p. 88; Doc. 273, p. 105. Applying these figures, the Court finds that the average number of routes that most bus drivers drive is 3.52. The Court agrees with plaintiffs' expert, Mr. Donn, that this number of trips per driver is average "for the nature of the system." Doc. 277, pp. 36-37.

81. After reviewing the driver logs, Mr. Donn found that up to 304 bus routes had less than 26 passengers. Doc. 269, p. 77-78. Based on this information, Mr. Donn testified that there could be "better utilization" of the buses and that was "a relatively high number of trips to have that type of low ridership." Id. at 78. This underutilization of the buses has a financial impact on the school system. Id.

82. A platoon run is when a bus takes a group of students from a school and moves them directly to another school for a program. Id. at 33.

83. An "in-and-out route" is one where the bus driver drives in and out of the neighborhood so that the students are not required to walk more than the distance required by statute. Doc. 267, p. 123. "The driver might go down the street for five blocks, turn two blocks over and come back and weave his way around so that you would minimize the distance that the students had to walk to catch the bus." Id.

84. Transit type routing is when "the bus rolls down the street and anybody who lives from one side or the other is required to come out and catch the bus . . . ." Id. at 124.

85. In transit type routing, the bus does not pick the students up at home. Id. at 87-88. The bus travels along "through-streets" and the students walk to the street to catch the bus "without regard to how far they have to walk to catch it." Id.

86. The JPPSS employs "transit type routing . . . very extensively with the nonpublic high schools and to a lesser degree with nonpublic elementary schools." Id. at 88.

87. The First Edition states that for public school students, transit-type routing "is to be utilized where necessary to reduce per-student costs to an acceptable level . . . ." Ex. S-18, p. 48.

88. Even though transit type routing is approved for public school students in the First Edition, Mr. Horne testified that transit type routing is not used for the public schools. Doc. 267, p. 88. In-and-out routing is used for public school students.

89. Transit type routing is preferable to in-and-out routing "from a cost standpoint but from the standpoint of safety and providing better services to the riders it is not." Id. at 91.

90. Transit type routing is less safe than in-and-out routing but it is "not unsafe." Id. at 124.

91. In addition, the First Edition provides that for public school students, "parents may be required to bring students to a designated centralized bus stop location . . . Supervision of students at a central bus stop shall be the responsibility of parents or school personnel." Ex. S-18, p. 48.

92. Centralized bus stop locations are not used for public school students, even though they are used for nonpublic

school students. Doc. 267, pp. 88-89. The parents supervise the nonpublic school students at the centralized bus stop locations. Id. at 18. They are not compensated for their services by the Jefferson Parish School Board. Id. at 90.

93. Shuttle runs are "an integral tool in the pupil transportation industry." Doc. 277, p. 67. The 1985 edition of "Standards for School Buses and Operations" provides for a shuttle route as a routing technique. Ex. P-784, p. 60. It states: "A shuttle route extends between two or more school buildings. Such routes are often required for the transfer of pupils in districts operating two or more schools." Id.

94. Mr. Donn defined a shuttle route as:

> A potential shuttle route would be a route whereby you would have youngsters of two or more schools on the same bus. It would then arrive at a particular school and there would be other buses bringing in youngsters that would attend another school. They would transfer and then one bus or two buses, depending upon your numbers, would go directly to the assignment school of those particular students versus a combination which I have indicated before where the bus would maybe visit both schools.

Doc. 270, p. 7.

95. The main benefit of a shuttle run is that a busload of children can be moved from Point A to Point B much faster than if the bus had to cover the entire geographical area to pick up the children. Doc. 277, pp. 65-66. Mr. Donn testified that "if you can use four or five buses to pick the youngsters up, which means that you cover the area by one fourth or one fifth, the ride time is decreased; then you use a shuttle between Point A and Point B which is going to be a lot less

than trying to duplicate all four or five bus pick-up areas." Id. at 66. School administrators and teachers normally coordinate the transfers to the shuttles and so precautions are taken and safety problems are avoided. Id.

96. According to the Collective Bargaining Agreement, a teacher assigned to bus duty has to remain at the school "for as long as there are buses coming into the school." Doc. 276, p. 23.

97. The 1985 edition of "Standards for School Buses and Operations" states that it is "considered poor practice to negotiate a U-turn on main arteries of traffic even though provisions for such turns may have been made." Ex. P-784, p. 61. The reason given is that "the projection of the rear end of the bus into inside traffic lanes from medians that are too narrow to accommodate bus length often creates traffic interference that places the lives of transported pupils in jeopardy." Id. U-turns create a risk both to the passengers on the bus and to the public. Doc. 270, p. 64.

98. Mr. Donn testified that combination/shuttle routes should be created to avoid the bus having to make a U-turn. Id. at 65.

99. Mr. Donn testified that a public school route is generally more expensive than a nonpublic school route because of the additional expenses of complying with desegregation rulings and transporting special education students. Doc. 269, p. 82. In addition, transit type routes are generally more economical than in-and-out routes, and transit type routes are only used for nonpublic school students in Jefferson Parish. Id. at 80-81.

100. Approximately 150 nonpublic school routes were in operation in the 1989-90 school year in Jefferson Parish. Doc. 270, p. 70.

101. In Mr. Donn's opinion, the Jefferson Parish School Board has "not done as good a job as they could have" in utilizing their school buses. Id. at 84. Mr. Donn testified that the Jefferson Parish School Board has "the parameters to put together combination and shuttle runs and do a better job of integrating both public and nonpublic on the buses than what they are doing presently." Id. at 99.

102. It is Mr. Donn's opinion "that the Jefferson Parish public school system could integrate the bus service of public and nonpublic school children on many routes. With close proximity of some schools the same bus could transport both public and nonpublic pupils and stop at each school. Other situations the school system could use a shuttle bus between the public and nonpublic school." Doc. 269, pp. 59-60. Mr. Donn found that combination routes "decrease the number of buses repeating service within the same community and . . . the cost of a shuttle run is far less than duplicating services." Id. at 60.

103. The Court finds that additional expenses are incurred by the Transportation Department of the JPPSS by operating buses on unique routes. Operating separate buses for each school appears to the Court to increase the mileage for the school bus drivers and thus the cost to the transportation system. In addition, the buses are usually not filled to capacity by using this approach to busing which results in additional expenses. The most cost effective approach appears to be combining routes of schools of similar grades that are in close proximity to each other, whether the schools are public and nonpublic. Usually this would entail combining public and nonpublic schools because they would

more likely be located in the same transportation district. Even though combination routes appear to be more economical than unique routes, a paramount concern is the safety of the children on the bus. The evidence presented at trial convinces the Court that unique routes are usually safer than combination routes, especially for elementary school children.

104. JPPSS routes for both public and nonpublic school students are set to operate within "time windows." A "time window . . . [is] the period of time at which the students can first be dropped off at a school up to the starting time" or picked up after the school closing time. Doc. 274, p. 63. The time windows are 30 minutes long, except for the last school drop-off on a morning multitrip route (which is 15 minutes long), and the first school pick-up on the afternoon multitrip route (which is 10 minutes long). Id.; Ex. S-18; Doc. 273, p. 104.

105. Jefferson Parish public high schools originally started classes at 7:00 a.m., when a shortage of space required JPPSS to hold two separate daily high school sessions to accommodate all of the students. The first session was "from 7:00 a.m. to approximately noon or maybe 12:15. Another group of students would come in at approximately 12:30 and stay until around 5:30 in the evening. . . ." Doc. 267, pp. 26-27. This practice, known as "platooning," ended in 1976. Id.

106. When the "platooning" of the public high schools ended, the JPPSS "wanted to change . . . the early starting times." Id. at 27. However, the state Department of Education denied the request of the JPPSS for additional buses "because of the financial hardship the state was experiencing." Id. Thus, the Transportation Department maintained an early starting time for the public high schools and relied on its existing fleet of buses. Id. at 26-27.

107. The first substantial complaints about the early starting times for the public schools were received by the JPPSS prior to the 1985-86 school year. Id. at 28.

108. Because of these complaints, including complaints of plaintiff, Mary "Neva" Helms, on June 19, 1985, the Jefferson Parish School Board established the School Time Task Force (hereinafter "Task Force"). Ex. P-372. The Task Force was comprised of parochial school parents and principals; public school parents and principals; bus drivers; and the Transportation Department. Id. Plaintiffs, Mrs. Helms and Marie Schneider, were members of the Task Force. Id.

109. The goal of the Task Force was "to develop a plan for establishing daily public and non-public school time schedules that provide for starting times later than 7:00 A.M. but not later than 9:00 A.M. and ending times not later than 3:30 P.M., with a tentative completion date of February 26, 1986." Id.

110. Since a consensus could not be reached on any issue, the Task Force elected to make 26 recommendations. Id. at 34. Each recommendation was voted upon and all of the recommendations were submitted to the Jefferson Parish School Board "because some members of the Task Force felt that if we didn't at least show the Board what was being discussed and what some groups felt that it really wouldn't be fair." Id.

111. By a vote of 25 "yes" to 7 "no" the Task Force recommended that all high schools start between 7:30 a.m. and 8:00 a.m. and all middle and junior high schools start between 7:30 and 8:15 a.m. Ex. P-372.

112. On March 5, 1986, Mr. Horne, the Task Force Chairman, reported to the Jefferson Parish School Board that "1985-86 high school, middle and junior high school time schedules can be moved to a later starting time. How much later depends on which recommendations are adopted, when they are adopted, how traffic may affect route times later in the mornings and afternoons, etc." Ex. P-324.

113. On March 19, 1986, the Jefferson Parish School Board recommended that all high schools and career centers start at 7:20 a.m. and all middle and junior high schools start at 7:30 a.m. Ex. P-446. Thus major changes were made in the 1986-87 school time schedule "in order not to start schools before 7:20 A.M. and not after 9:00 A.M." Ex. P-321.

114. At the time the recommendation was made, the public high schools had started classes at 7:00 a.m., with two exceptions, and the nonpublic high schools had started at "7:15, 8:00, 9:00, various times." Doc. 262, p. 108. After this recommendation was adopted by the Jefferson Parish School Board, all high schools and career centers started classes at 7:20 a.m., with two exceptions. Id. For the 1989-90 school year, one Catholic high school requested an earlier starting time of 7:15 a.m. which was permitted. Id.

115. The changes in the starting times for the high schools affected the starting times for the elementary schools because of the reduced "time window available to transport the students." Doc. 267, p. 55. Thus, for the 1986-87 school year, 40 elementary schools started classes at 9:00 a.m., as opposed to 25 schools starting classes at 9:00 a.m. for the 1985-86 school year. Id.; Ex. P-320.

116. The Task Force also considered combination routes. The members voted 14 "yes" and 17 "no" on the

recommendation that all public and non-public secondary schools be considered together in assigning combination routes. Ex. P-372.

117. By a vote of 17 "yes" and 15 "no", the Task Force recommended that combination routes for public and nonpublic high school students be established "within the district boundaries established in accordance with number 7 above." Id.

118. The seventh recommendation, for which 20 members of the Task Force voted "yes" and 12 voted "no", was that all schools be assigned districts and all out-of-district transportation be eliminated except as required for racial balance, special education, and English as a Second Language (E.S.L.). Id.

119. After considering the Task Force's recommendations, the Jefferson Parish School Board also recommended that the JPPSS "establish combination routes for public and nonpublic high school students if, after students are assigned to buses, there are too few students remaining to warrant adding another bus solely for one school." Ex. P-446.

120. The recommendation does not appear to have been implemented by the Transportation Department. On the east bank of Jefferson Parish, Mr. Horne testified that there are no combination routes or any other transit type routes for public and nonpublic high school students. Doc. 263, p. 47. On the west bank of Jefferson Parish, there are one or two combination routes involving Lincoln Career Center, a public school, and two of the nonpublic high schools. Id. at 44. There is also "combination transit type routing" for two nonpublic high schools on the west bank. Id. at 47.

121. The Court finds that there was no evidence presented at trial that any nonpublic high schools objected to the establishment of combination routes. In fact, the Court is persuaded that the nonpublic high schools would welcome the increase in service areas which should result if the Transportation Department implements the Jefferson Parish School Board recommendation of employing combination routes for the public and nonpublic high schools.

122. For the 1988-89 school year, there appear to be six nonspecial education routes where both public and nonpublic elementary school students were combined to ride on the same bus. Id. at 87; Ex. P-353.

123. Another recommendation by the JPSB was that all requests for new out-of-district routes be denied, "except special education, racial balance and E.S.L., and these types of routes must be approved and funded by the State." Ex. P-446. This recommendation was implemented by the Transportation Department. Doc. 262, p. 111.

124. The Jefferson Parish School Board also recommended that specific schools be assigned geographic areas for transportation purposes. Ex. P-446. The Transportation Department then implemented this recommendation for all Catholic elementary and high schools and all Lutheran schools. Doc. 262, p. 112.

125. The Second Edition defines a nonpublic school district as "a church parish, community, congregation, or other such designation of a geographic area, or a portion thereof, all located within the civil parish of Jefferson." Ex. S-19, pp. 22-23.

126. The transportation districts for the nonpublic elementary schools were the church parishes, with the

exception of parishes without a school. For parishes without a school, a district was configured "that would be a close and tight-knit district" and that would include nonpublic schools in close proximity to those parishes. Doc. 264, pp. 33-34.

127. In Jefferson Parish, there is no Catholic elementary school located in 9 church parishes: Nativity of Our Lord Parish, St. Jerome Parish, St. Bonaventure Parish, St. Anthony (Barataria) Parish, Holy Guardian Angel Parish (Bridge City), St. Pius X Parish (Crown Point), Infant Jesus of Prague Parish, St. Martha Parish, and Our Lady of the Angels Parish. P-411 at p. 7; Doc. 263, pp. 147-50; Doc. 274, pp. 97-98.[9]

128. St. Jerome and Nativity of Our Lord are two neighboring church parishes without schools. Ex. S-34, p. 2. The transportation districts that were created for those parishes include five contiguous nonpublic schools, St. Philip Neri, St. Lawrence the Martyr, St. Mary Magdalen, Our Lady of Divine Providence, and Our Lady of Perpetual Help. Doc. 264, p. 32; Ex. S-34, p. 3.

129. The Second Edition sets forth the present policy of the Jefferson Parish School Board regarding out-of-district transportation for nonpublic school students. Section 11(a) states: "Students shall not be transported from their home-district to a school in another district except as approved in the annual agreements between non-public school representatives and the Jefferson Parish School Board." Ex. S-19, p. 22.

130. From the 1976-77 school year until the 1988-89 school year, the policy of the Jefferson Parish School Board

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[9] St. Elizabeth Ann Seton Parish now has a parochial elementary school.

concerning out-of-district transportation of nonpublic school students was:

> Students shall not be transported from their home district to a school in another district if 1. There is a home-district school of suitable grade organization, AND 2. The home district school is capable of accommodating a greater number of students from other districts than there are home district students attending other schools.

Ex. P-411; Doc. 267, p. 82.

131. Mr. Horns explained how the Transportation Department interpreted these restrictions regarding the transportation of nonpublic school students who were enrolled in nonpublic schools outside of their church parishes. Doc. 274, p. 91. The first restriction was that if a student could be enrolled at the nonpublic school within his church parish but chose to attend another nonpublic school, he was not eligible for transportation. Id. The second restriction was that if the student resided in a church parish that either had no school or had a school that could not accommodate all of the students who lived there "then he or she could be transported to a school that had space to accommodate him provided that there were forty or more students attending that school and the [Transportation Department] could obtain approval from the state Department of Education to implement and fund the route." Id. at 91-92.

132. At the beginning of the 1988-89 school year, the Jefferson Parish School Board did not fund the transportation of any nonpublic school students out-of-district. Doc. 267, p. 42. Eventually, the JPSB provided bus transportation to students from a church parish that had no nonpublic school

> 3. If said payment is determined to be unconstitutional, illegal or in violation of Louisiana Department of Education policies and procedures, Westbank Cathedral Academy agrees to refund to the Jefferson Parish School Board the full amount of $15,539 within thirty (30) days of the date of notification of the violation.

Ex. P-316. An identical agreement was entered into by the JPSB with Faith Lutheran School for the 1988-89 school year, the only variation being that the amount of money to be paid to Faith Lutheran was to be set at $6,563. Id.

155. For the 1989-90 school year, the agreements with Westbank Cathedral Academy and Faith Lutheran School were modified to include the language that "the money shall be used for transportation services only." Ex. S-24.

156. The Transportation Department was not advised as to the cost of the transportation services for those two schools. Doc. 263, pp. 10-11.

157. Westbank Cathedral Academy used the transportation funds to pay for repairs to the school's own buses. Id. at 10.

158. The Court finds that Westbank Cathedral Academy and Faith Lutheran School had control over the transportation money paid to them by the Jefferson Parish School Board.

159. For the 1988-89 school year, the Jefferson Parish Public School System began the year with no out-of-district transportation for nonpublic elementary schools. Doc. 267, p. 42.

160. As a result of a meeting held in September 1988 with the Archbishop of New Orleans, various members of the

Jefferson Parish School Board, Mr. Horne, and Superintendent Protti, the Archdiocese of New Orleans agreed to assume responsibility for the shortfall in state funding, and transportation services were restored to the prior year's level. Doc. 262, pp. 65-66. "Out-of-district busing" was then provided to the nonpublic schools and the transportation services were funded by the state and "by the parents of elementary school students, Catholic elementary school students specifically." Doc. 267, pp. 43-44, 53.

161. During the 1988-89 school year all parents of nonpublic school students receiving transportation services were required to pay a fee for transportation, whether their child was being transported within the district or out of the district. Id. at 113. "The decision was made by Archdiocesan school officials and not by the Jefferson Parish school system that all these students would share the cost." Id. at 114.

162. For the 1988-89 school year, the amount of $24.00 was charged per child to fund out-of-church parish transportation. Doc. 276, p. 25. The $24.00 figure was arrived at by determining the difference between the projected cost of transportation and the projected revenue from the state. Id. All children receiving bus transportation were charged $24.00, whether they were being transported in-parish or out-of-parish. Id. at 25-27.

163. The Jefferson Parish School Board discontinued some of the nonpublic school transportation in May 1988 because of the failure of the JPSB to receive all of the funds from the Catholic schools. Doc. 262, p. 67.

164. At these meetings during 1988-89, Mr. Horne and his staff discussed transportation, not religion, with

representatives of the administrations of all nonpublic schools. Doc. 267, p. 70-71.

165. At the meeting with the state education officials, including Mr. Jennings Cleveland, "the person who handles the budgets and other programs for the Department of Education," in August 1988, Mr. Horne understood that the Jefferson Parish School Board would have to reach an agreement with the individual nonpublic schools or "with whatever other umbrella association or organization might exist" in Jefferson Parish in order to receive funding for transportation to those schools. Doc. 265, p. 62; Doc. 274, pp. 85-86.

166. Mr. Cleveland testified that if the School Board did not obtain the signature of the Catholic diocese on the agreement, the State would not disburse the transportation money for the nonpublic schools. Doc. 265, pp. 119-120.

167. Mr. Graig Luscombe, the Deputy Superintendent for Management and Finance in the Louisiana Department of Education, Mr. Cleveland's supervisor, disagreed with Mr. Cleveland's testimony. Mr. Luscombe stated that it was "not the policy of the department" to "primarily look[] at the signatures of representatives of the dioceses throughout the State." Doc. 274, p. 14.

168. The Louisiana Department of Education has not encountered a situation where one representative of a nonpublic school has entered into an agreement concerning transportation funds with the local school board and another nonpublic school has not entered into the agreement. Id. at 10.

169. Mr. Luscombe testified that the policy of the Louisiana Department of Education is to make "a pro rata

reduction" to the parish if an agreement has not been reached with all of the nonpublic schools. Id. at 17. The pro rata reduction would be based on figures calculated for the 1987-88 school year. Id.

170. At the time of the trial, if a nonpublic school did not participate in the transportation program for the 1987-88 school year, the State would not allow that nonpublic school to participate in the transportation program for any other school year. Id. at 18-19.

171. On June 21, 1989, the Jefferson Pariah School Board approved a nonpublic school transportation plan based on the receipt of $1,211,849.00 from the State. Ex. S-24.

172. On July 24, 1989, the JPPSS received notice that the State had increased the funding for nonpublic school transportation by $278,788.00, for a total of $1,490,637.00. Id.

173. The Jefferson Parish School Board did not establish any additional bus routes with the increase in funding. Doc. 264, p. 81.

174. The Transportation Department and the Archdiocese of New Orleans discussed two possibilities for using the additional funds: (1) additional bus stops and (2) providing "privately contracted bus service for those students who had been eliminated from the transportation plan or from the transportation services . . . ." Id. at 41.

175. "Very few additional bus stops were actually put in place" with the additional funds. Id. at 36.

176. The Jefferson Non-Public School Transportation Corporation was then formed on September 28, 1989. Ex. P-

to a church parish that did have a nonpublic school, because the parents of nonpublic bus passengers paid the JPSB for these services. Id. at 43.

133. For the 1989-90 school year, the Jefferson Parish School Board furnished "nonpublic school out-of-church parish transportation" to a reduced number of nonpublic schools. Id. at 53. Only state funds were used and there was no cost to the parents or to the Jefferson Parish School Board. Id. at 53-54.

134. Mr. Horne testified as to the changes that occurred from December 1985 until the 1988-89 school year which resulted in the revised Jefferson Parish School Board policy concerning out-of-district transportation for nonpublic school students:

> There were time schedule changes. There were recommendations to look at the feasibility of combination bus routes. There were established policies for nonpublic schools relative to central pick-up points, transit type routing, elimination of transportation in certain districts.
>
> When the cuts came down from the state for the 1988-'89 year there were some very dramatic changes taken to cut back particularly in the area of high school transportation. There were further restrictions on the out-of-district transportation. We eliminated service to any students who lived in a church parish that had a school, so we eliminated that category altogether. The only students that could receive transportation out of district after '80 -- beginning with '88-'89 were those students who lived in a parish that had no school. There were a variety of changes made during that five, five-year period.

Doc. 274, p. 104.

135. JPPSS transports public school students who require special education and ESL services to special schools outside of their home district. Doc. 267, p. 77.

136. JPPSS also transports public school students out-of-district in accordance with a court ordered desegregation plan. Doc. 266, p. 5.

137. The JPPSS permits any public school student in grades K-12 to apply to attend a public school outside of his attendance district by obtaining a "transfer request form." Ex. S-18, p. 25.

138. "Thousands" of public school students have received "permits" to attend public schools in other districts "and in some cases they are provided transportation and in some cases they are not . . . There is no cost to the parents." Doc. 263, p. 63-64.

139. The First Edition which applies to public school students states, in capital letters, that "TRANSPORTATION OF STUDENTS WHO ARE GRANTED TRANSFERS IN ACCORDANCE WITH THESE PROCEDURES SHALL BE THE RESPONSIBILITY OF THE PARENT(S) OR LEGAL GUARDIAN(S)." Ex. S-18, p. 26.

140. Notwithstanding this condition, Mr. Horne testified that the JPPSS provides school bus transportation to some public school students who have been granted transfer permits "if it is not necessary to reroute the bus, there is space available and the student behaves himself or herself on the bus, they meet the bus at a designated bus stop and we can accommodate the child, since we are in the business of kids we certainly do it." Doc. 263, p. 64.

141. The Jefferson Parish School Board did not charge public school students for out-of-district transportation because "counsel advised the Jefferson Parish School Board that the laws of the State of Louisiana would not permit them to do so." Doc. 274, p. 101.

142. The Court finds that there is limited out-of-district busing for both public and nonpublic school students in Jefferson Parish.

143. Funding for school transportation in Louisiana consists of two categories: base pay and operational pay. Doc. 263, p. 91: Base pay consists of salaries paid to the bus drivers. Operational pay is "a mileage payment given to the driver who owns or operates his bus or in the case of a school district that owns its own fleet of buses the same rate of pay is provided based on mileage." Id. at 91-92. There are other fixed coats including vehicle liability insurance, health insurance, retirement benefits, and sick leave. Id. at 92.

144. In addition to the state funding for transportation, the Jefferson Parish Public School System also provides additional base pay and additional operational pay to the bus drivers. Doc. 263, p. 92. Mr. Horne explained that these local supplements were justified because "we work our drivers a longer day, we assign them additional routes, there is more wear and tear in this area and we feel that in order to have a quality fleet that we have enjoyed for a long time we have to do that." Id. at 92.

145. For the 1988-89 school year, the "average" income for bus drivers, including salary and operational pay, was $24,364.60. This figure was arrived at by subtracting the salaries of the bus attendants, $356,756.40, from the grand total salaries of $9,152,379.00, and dividing that amount by

361, the number of bus drivers. Ex. P-361; Doc. 274, pp. 127-28.

146. Bus drivers employed by the Jefferson Parish School Board are permitted to have other employment and the "only requirement is that no other job can interfere with their work in the Jefferson Parish school system." Doc. 273, p. 147.

147. School bus drivers are paid according to the trip involved and not according to the number of students assigned to their buses in order to "curtail overloading buses." Ex. S-18, p. 62.

148. From 1980 until 1988, nonpublic school transportation was handled by an agreement between the State of Louisiana and the school board which had the authority to elect to transport or not to transport nonpublic school children. Doc. 265, p. 108.

149. In 1988, the Louisiana legislature separated the funding of transportation for nonpublic school children from the funding of transportation for public school children. Id. at 108. Although the funding of public school transportation continued to remain a part of the minimum foundation formula, the nonpublic school transportation was funded through a separate supplemental school assistance arrangement which was outside of the minimum foundation formula. Id.

150. On July 27, 1988, Wilmer S. Cody, State Superintendent of Education, informed Dr. Russell J. Protti, Superintendent of the Jefferson Parish Schools, by letter that for the 1988-89 school year, the allocation of funds for the transportation of nonpublic school students would be a separate appropriation from the funds appropriated for the public school students. Ex. S-20. The funds for nonpublic

school transportation were reduced 25% for the 1988-89 school year. Ex. S-20. The Jefferson Parish Public School System was allocated $1,211,849.00 to provide transportation for the nonpublic school students in Jefferson Parish. Id. Mr. Cody recommended "that representatives from your system meet with representatives of the non-public schools to formulate a formal agreement for services to be rendered during the school year which takes this budget reduction into consideration." Id. This agreement, which was to be signed by a representative of the Jefferson Parish Public School System and the appropriate representatives of the nonpublic schools, had to be submitted to the Louisiana Department of Education before any transportation funds would be distributed. Ex. S-20; P-477.

151. Because of financial difficulties that the Jefferson Parish Public School System was experiencing, the Transportation Department decided to recommend to the School Board that no local supplement be paid for funding nonpublic school transportation. Doc. 263, p. 93.

152. Several meetings were held in July and August 1988 to discuss the reduction in state funding for nonpublic school transportation. Ex. P-518. Various representatives of the Jefferson Parish Public School System, the Archdiocese of New Orleans, and other non-public schools attended the meetings. At the meeting held on August 16, 1988, Howard Jenkins, Tom Rayer, Dr. Russell J. Protti, George Horne, and Jack Grant reached an agreement on terms and conditions. Ex. P-518; Doc. 264, pp. 15-17. At that meeting it was agreed that:

> 1. Transportation expenses for Catholic school students for the 1988-89 school year will be limited to the reimbursement from the State of Louisiana in the amount of $1,105,000.00; and

2. In order to meet the aforesaid amount it is necessary to eliminate all of the costs of out-of-district student bussing (sic) and approximately 50% of the costs of high school student bussing (sic) during the 1988-89 school year.

Ex. P-476. The agreement was signed by Elton M. Lagasse, President of the Jefferson Parish School Board, and Howard Jenkins, Superintendent of the Archdiocese of New Orleans. Id.

153. On August 19, 1988, agreements were reached with the following nonpublic schools: Atonement Lutheran School, Chinchuba Institute, Concordia Lutheran School, Salem Lutheran School, and Westbank Association for Retarded Citizens. Ex. P-518, p. 11. In addition, the Jefferson Parish School Board agreed that Faith Lutheran School and Westbank Cathedral Academy, which did not wish to contract with JPPSS for transportation services, could receive their pro rata share of the state funds to be applied to privately contracted services. Id. at 11.

154. In the agreement entered into between the Jefferson Parish School Board, "as local agent for the Louisiana Department of Education," and West Bank Cathedral Academy, it was agreed that payments for transportation for 1988-89 would be made with the following stipulations:

1. Payment is made in lieu of actual transportation services by the Jefferson Parish Public School System.

2. The amount of $15,539 is seventy-five percent (75%) of the pro-rata state reimbursement for transportation in 1987-88, and represents the authorized payment by the State Department of Education for 1988-89.

775. The objects and purposes of this non-profit corporation are as follows:

> To provide transportation for the children of parents residing in the Parish of Jefferson who have enrolled their children in parochial schools within the Parish of Jefferson other than their own church parish because of the fact that the parish in which said parents reside does not operate a parochial school, through means of contractual relationships with third parties for the providing of such services, and or the purchase or acquisition of equipment or the employment of persons in connection with the providing of such transportation services; and to enter into any and all other contractual arrangements of lease, purchase or joint venture which this corporation may deem necessary or appropriate in order to provide adequate means of transportation for said children; to enter into agreements with the Jefferson Parish School Board for reimbursement of the cost of such transportation; and to receive donations, gifts or bequests in furtherance of said objects and purposes, and to do and perform all and every act, matter and thing that non-profit corporations are, by law, authorized to do and perform.

Id.

177. The Jefferson Non-Public School Transportation Corporation has members from six nonpublic schools: St. Christopher, St. Catherine of Siena, St. Louis King of France, St. Agnes, St. Angela Merici, and St. Matthew the Apostle. Ex. P-776; Doc. 264, pp. 47-48.

178. On February 6, 1990, the Jefferson Parish School Board paid the Jefferson Non-Public School Transportation Corporation the amount of $100,195.00 "in lieu of transportation services previously provided by the Jefferson

Parish Public School System for some of the students attending St. Agnes, St. Angela, St. Catherine of Siena, St. Christopher, St. Louis and St. Matthew Schools." Ex. P-774.

179. The $100,195.00 was paid to "privately contracted bus drivers" who provided bus services for 368 students attending St. Agnes, St. Angela Merici, St. Catherine of Siena, St. Christopher, St. Louis King of France, and St. Matthew the Apostle. Ex. P-781.

180. Out of the $100,195.00, the sum of $13,200.00 was to pay for the transportation of 33 students to St. Agnes; $14,400.00 was for transporting 31 students to St. Angela Merici; $45,040.00 was for transporting 193 students to St. Catherine of Siena; $9,630.00 was for transporting 36 students to St. Christopher; $15,000.00 was for transporting 62 students to St. Louis King of France; and $2,925.00 was for transporting 13 students to St. Matthew the Apostle. Doc. 264, pp. 58-59; Ex. P-781.

181. The Court finds that the funds paid to the Jefferson Non-Public School Transportation Corporation were clearly spent for transportation of nonpublic school students.

182. For the 1989-90 school year, approximately 2,000 "nonpublic Catholic school students in the Archdiocese of New Orleans" attending "east bank and west bank elementary and secondary" schools "who wanted transportation" were denied transportation by the Jefferson Parish School Board. Doc. 264, pp. 72-73.

CONCLUSIONS OF LAW

1. In *Everson v. Board of Education, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947)*, the United States Supreme Court held that the Establishment Clause of the First Amendment

does not forbid a State from paying for the transportation of school children to parochial as well as public schools. The Everson Court "approved a system under which a New Jersey board of education reimbursed parents for the cost of sending their children to and from school, public or parochial, by public carrier." *Wolman v. Walter, 433 U.S. 229, 253, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977).*

2. In considering a transportation program, the Wolman Court noted that the two critical factors are that "the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided." *433 U.S. at 253.*

3. The Wolman Court held that providing transportation for field trips to nonpublic school students was unconstitutional. *Id. at 254.* The Court found impermissible that the nonpublic schools controlled the timing and frequency of the field trips and so were the primary recipients of the service. *Id. at 253.* In addition, the Court noted that "field trips are an integral part of the educational experience . . . ," and thus there is a risk of fostering religion. *Id. at 253-54.*

4. The transportation system in Everson was found to be constitutional "because the school did not determine how often the pupil traveled between home and school - every child must make one round trip every day - and because the travel was unrelated to any aspect of the curriculum." *Wolman, 433 U.S. at 253.*

5. As in Everson, bus transportation was provided by the Jefferson Parish School Board for one round trip per day and the bus transportation was "unrelated to an aspect of the curriculum" of the nonpublic schools. *Wolman, 433 U.S. at 253.* The children are the primary recipients of the

transportation service in Jefferson Parish, not the nonpublic schools. Id.

6. In *Norwood v. Harrison, 413 U.S. 455, 37 L. Ed. 2d 723, 93 S. Ct. 2804 (1973),* the Supreme Court held that the Constitution prohibited the State of Mississippi from providing free textbooks to private schools which had racially discriminatory policies. "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Id. at 463.*

7. The Norwood Court distinguished between parochial schools and private schools, noting that parochial schools "pursue two goals, religious instruction and secular education." *413 U.S. at 468.* The Supreme Court found that States may provide assistance to parochial schools in performing their secular functions "where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests." Id. This assistance may be provided for two reasons: the substantial interest of the states in the quality of education provided by private schools and "because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." Id.

8. A state is not "constitutionally obligated to provide even 'neutral' services to sectarian schools." *Norwood, 413 U.S. at 469.*

9. The Everson Court held that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be

and incidental' benefit to offering a 'direct and immediate' benefit to religion." Id.

21. The Court finds no impermissible purpose or effect in the decision of the Jefferson Parish School Board to assign busing of students according to the schools they attend. Each school is treated approximately the same, whether public or nonpublic, even though it appears to the Court that greater benefits are provided to the public school students. The nonpublic schools may be afforded more out-of-district busing than the public schools. This is directly attributable to the fact that several church parishes do not have elementary schools. There has been no evidence presented to show any illicit motives in the failure of the Archdiocese of New Orleans to establish nonpublic schools in these church parishes.

In the instant case, parochial school students are bused to out-of-district parochial schools, if their church parish does not have a parochial school. A similar situation does not exist for the public schools in that there is no district without a public school. Public school students are not ordinarily bused to an out-of-district school, unless they are special education students, English as a second language students, or because of court ordered integration. If a public school student receives a transfer permit to attend an out-of-district public school, he is responsible for his own transportation to that school, unless he can make special arrangements.

The public school students, on the other hand, are provided with the most preferable busing, that is, busing on in-and-out routes, while the nonpublic school students are provided transit type routing and central pick-up locations in order to insure that 40 students are on the bus. There is no minimum requirement of passengers for buses travelling to public schools as there is for the nonpublic schools.

22. The Jamestown court did not find it constitutionally significant that parochial students were bused over special routes rather than established public school routes. *699 F.2d at 9.* In fact, the Jamestown court noted that the parochial students "must necessarily be bused on other than established public school routes," because they were being bused to nonpublic schools beyond public school district lines. Id. The fact that different routes were used by the nonpublic schools and the public schools suggests strongly to the Court that separate buses were used for transporting the students. Id.

23. Considering all of the evidence and the law, the Court does not find that the Establishment Clause mandates the creation of combination routes to transport public and nonpublic school students in Jefferson Parish. The Court finds that the Jefferson Parish School Board's bus transportation program which results in separate transportation of public and nonpublic school children is constitutional in its application.

24. The Court finds that the transportation statute, as amended, will not foster any excessive entanglement of church and state in Jefferson Parish. The Supreme Court has recognized that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society . . . ." *Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123, 74 L. Ed. 2d 297, 103 S. Ct. 505 (1982).* The usual contacts between church and state over nonpublic student transportation "are ministerial and mechanical in nature, and concern administrative, not religious matters." *Jamestown, 699 F.2d at 12.* They do not create an excessive entanglement of church and state.

25. In Jamestown, the First Circuit Court of Appeals found that contacts between public school and parochial school

administrators discussing proper scheduling and routing of buses were ministerial and did not involve religious matters. *Id. at 12.* The Court finds that the discussions between the Jefferson Parish School Board and nonpublic school officials concerning transportation districts, routing, and scheduling were also acceptable contacts which did not involve religious matters.

26. Public school parents had objected to the starting times of public and nonpublic schools. Their concerns were considered by a Task Force comprised of both public and nonpublic school representatives, and were resolved favorably and equitably by the Jefferson Parish School Board. These were not religious concerns, but rather concerned administrative matters, and were effectively addressed through administrative channels.

27. The decrease in funding by the State for nonpublic school transportation and the failure of the Jefferson Parish School Board to allocate any funds for nonpublic school transportation beginning with the 1988-89 school year created a controversy between the nonpublic schools and the Jefferson Parish School Board. Especially divisive was the fact that a fee was imposed on nonpublic school students for transportation services provided by the Jefferson Parish School Board. As in Jamestown, this type of controversy poses "a risk of constitutionally significant division along religious lines, for in such a case, parochial school parents have a special political interest as parochial school parents. . . ." *Jamestown, 699 F.2d at 12.*

28. The Court finds that the amendments to the transportation statute have eliminated any such controversy in the future because of the specification of "free" transportation; the tighter restrictions placed on a local school board seeking to eliminate or reduce transportation

services; and the requirement that any reduction or elimination in student transportation services not have a "disparate impact" on either public or nonpublic school students. La. Rev. Stat. Ann. § 17:158(A), (H). Nonpublic school children can no longer be assessed any fee for bus transportation provided by the Jefferson Parish School Board. The Court finds that the amendments and additions to the transportation statute are an attempt to ensure that financial problems of the local school boards do not result in inequitable treatment to either public or nonpublic school students.

29. The Court finds that the amendments to the transportation statute have effectively eliminated the possibility of further political divisiveness along religious lines and any excessive entanglement between the Jefferson Parish School Board and the nonpublic schools.

30. The Court finds that the allocation of state transportation funds directly to Westbank Cathedral Academy and Faith Lutheran School by the Jefferson Parish School Board is an unconstitutional direct subsidy to nonpublic schools. The schools themselves control the expenditure of the funds. In addition, the Jefferson Parish School Board did not require an audit or other verification to ensure that the funds were spent only for transportation and not for religious purposes. Applying the clear holding of Wolman that the nonpublic school is to have no control over the expenditure of the funds, *433 U.S. at 253*, the Court finds that the transportation contracts between Westbank Cathedral Academy and the Jefferson Parish School Board and between Faith Lutheran School and the Jefferson Parish School Board violate the Establishment Clause.

31. The Jefferson Parish Nonpublic School Transportation Corporation, with which the Jefferson Parish School Board

contracted to provide transportation to some students attending Catholic schools, is an independent corporation which does not operate a school, engages in no instructional activity, and has used funds provided to it exclusively for the purpose of transporting nonpublic school children to and from their schools. Doc. 265, pp. 28-31, 58-60. La. Rev. Stat. § 17:158(A)(4) specifically allows a parish school board to enter into contracts for school bus transportation. The Court finds that this contract does not violate the Establishment Clause.

32. With the exception of the transportation contracts between Westbank Cathedral Academy and the Jefferson Parish School Board and between Faith Lutheran School and the Jefferson Parish School Board, the Court finds that the Jefferson Parish School Board's bus transportation program does not result in excessive entanglement.

33. Plaintiffs also assert that the student transportation program in effect in Jefferson Parish violates the Equal Protection Clause of the Fourteenth Amendment. They claim that the state and the Jefferson Parish School Board have classified transportation funds and bus routes into two groups based upon whether the child attends a public or a nonpublic school.

34. The Court does not find that assigning unique bus routes for each school, whether public or nonpublic, infringes upon fundamental rights and demands strict scrutiny. The Court will apply the rational basis test because student transportation falls within "the area of economics and social welfare." *Dandridge v. Williams, 397 U.S. 471, 484, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970); Springfield, 483 Pa. at 568 n.18, 397 A.2d at 1169 n.18; McCarthy v. Hornbeck, 590 F. Supp. 936, 946 (D. Md. 1984).*

35. The burden is on plaintiffs to convince this Court "that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *McCarthy, 590 F. Supp. at 946* (quoting *Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981)).*

36. In Norwood, the Supreme Court stated:

> It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

413 U.S. at 462.

37. The Supreme Court in Norwood found that the Equal Protection Clause does not require a state to provide financial assistance to parochial schools. *McCarthy, 590 F. Supp. at 947.* Since the Equal Protection Clause does not require the State to allocate any funds for nonpublic school transportation, the Court finds that a separate appropriation for nonpublic school transportation does not violate the Equal Protection Clause. The State must appropriate funds for public school transportation. Thus, it is logical to the Court that in formulating the budget, the State separated the mandatory appropriation for public school education, which includes transportation, from the optional appropriation for nonpublic school transportation, which is not required under the Equal Protection Clause. Transportation of public school children and transportation of nonpublic school children are different priorities to the State. Id.

used so as to handicap religions than it is to favor them." *330 U.S. at 18.*

10. The Supreme Court has recently restated this principle of neutrality in *Zobrest v. Catalina Foothills School Dist., 125 L. Ed. 2d 1, U.S. , 113 S. Ct. 2462, 2466 (1993).* The Zobrest Court noted that the Supreme Court has consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." Id.

11. Plaintiffs claim that the transportation system in Jefferson Parish, in particular the fact that each bus route services a single school, violates the neutrality concerns of the Establishment Clause of the First Amendment in its application.

12. The JPPSS student transportation program has the valid secular purpose of helping "parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Everson, 330 U.S. at 18.* "Protecting the child against the hazards of traffic, the exposure to inclement weather and the designs of persons who would harm them are well recognized secular governmental interests." *Springfield School District v. Pennsylvania Dep't of Educ., 483 Pa. 539, 550, 397 A.2d 1154, 1160,* appeal dismissed for want of a substantial federal question sub nom. *School District of Pittsburgh v. Pennsylvania Dep't of Educ., 443 U.S. 901, 61 L. Ed. 2d 869, 99 S. Ct. 3091 (1979).*

13. School bus transportation of nonpublic school students to and from school has not been found to advance religion. *Everson, 330 U.S. at 18; Meek v. Pittenger, 421 U.S. 349,*

364-65, 44 L. Ed. 2d 217, 95 S. Ct. 1753 (1975); Lemon v. Kurtzman, 403 U.S. 602, 616-17, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). The travel of nonpublic school students to their schools is not related to the religious mission of the nonpublic schools. *Norwood, 413 U.S. at 468.*

14. In Wolman, the Supreme Court held constitutional "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools . . . ." *433 U.S. at 248.* The Wolman Court emphasized the location where the services were to be performed, stating "the fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in Meek." *Id. at 247* (emphasis added). In Meek, the Supreme Court was worried that "publicly employed personnel" might instruct the students in their religious beliefs either directly or indirectly. Id. The "danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." Id.

There has been no evidence presented that JPPSS bus drivers might impart any religious beliefs to their bus passengers. As the Wolman Court emphasized, "the nature of the institution, not . . . the nature of the pupils" is the concern when public employees provide services only to nonpublic school students. *Id. at 247-48.* The JPPSS school buses are "truly religiously neutral locations." *Id. at 247.*

15. In *Lemon, 403 U.S. at 616-17,* the Supreme Court noted that the Establishment Clause permits bus transportation "supplied in common to all students."

16. In *Members of Jamestown School Con. v. Schmidt, 699 F.2d 1* (1st Cir.), cert. denied, *464 U.S. 851, 78 L. Ed. 2d 148, 104 S. Ct. 162 (1983),* the First Circuit Court of

Appeals carefully analyzed a Rhode Island statute that provided for the busing of nonpublic school children to schools outside of their districts. The Jamestown court stated that the Supreme Court in Wolman and other decisions has "referred uniformly to the constitutionality of transporting sectarian students as part of a 'general' program 'neutrally' provided 'in common' to 'all' school children." *699 F.2d at 9.* The Jamestown court found that "common to all" does not require "absolute equality" of access to busing or expenditure on busing for public and nonpublic school students. Id. Rather the court interpreted this "common to all" language to mean:

> Whether busing is within a district or across district lines, public and parochial students must be eligible for busing to their schools on the same terms: if distance is the criterion and sectarian students living a certain distance from their school are eligible for busing at public expense, public students living the same distance from their school must likewise be eligible.
>
> Just as important, the relative costs per-student of sectarian and public school busing must remain roughly proportional.

Id.

17. The Jamestown court found that the distance the students travelled on the buses was relevant to determine whether "the increased hazards of travel over increasing distances and for increasing times may outweigh the benefits of the bus." *Id. at 10.*

18. The Court does not find that the Jefferson Parish School Board has violated the neutrality concerns of the Establishment Clause of the First Amendment. The Court

finds that the Jefferson Parish School Board has provided unique bus routes, to all schools, regardless of whether the school is public or nonpublic. The Jefferson Parish School Board has made the determination that this type of transportation program best serves its citizens. No evidence was presented to the Court that the unique bus routes offer any "direct and immediate benefit" to religion. In fact, the evidence suggests that service to nonpublic schools would be improved if combination routes were used by the Jefferson Parish School Board in its transportation program. Thus, the Court does not find that unique bus routes serving only students attending a particular school, whether public or nonpublic, have the primary effect of advancing religion.

19. The Court finds that the cost of transporting nonpublic school students in Jefferson Parish is not "grossly disproportionate" to the cost of transporting public school students. *Jamestown, 699 F.2d at 10.* Thus, the expenditure on nonpublic school transportation, including the out-of-district routes, does not suggest that Jefferson Parish School Board's transportation program provides more benefits to nonpublic school children, than public school children. The fact that the Jefferson Parish School Board has refused to contribute local funds to nonpublic school transportation for several years because of financial concerns convinces the Court that the Jefferson Parish School Board did not confer any "direct and immediate" benefits to religion. Id.

20. The First Circuit Court of Appeals in Jamestown concluded that "where a forbidden purpose or an impermissible primary effect is indicated, or where palpable disparity has bred significant divisiveness along religious grounds, . . . a busing program will have ceased to be a 'general' program of secular benefits neutrally available to all, and will have crossed the line from providing a 'remote

38. As to the separate bus routes assigned to each school, whether public or nonpublic, the Court finds that this procedure does not confer greater benefits upon nonpublic school students than upon public school students. The Jefferson Parish School Board has a rational basis for concluding that this is the safest type of transportation for all of its students. It is obvious to the Court that it is usually safer for students to remain on one bus and not have to transfer to another bus for additional transportation. In addition, it is obvious that for elementary school students especially, it is safer for all of the students to exit at one school rather than risk a child exiting at the wrong school. Thus the Court rejects plaintiffs' Equal Protection challenge to the policy of the Jefferson Parish School Board to assign separate bus routes to each school, whether public or private.

C. WHETHER THE STATE STATUTE AUTHORIZING A FLAT RATE REIMBURSEMENT TO PARENTS TRANSPORTING THEIR CHILDREN TO SCHOOL IS UNCONSTITUTIONAL ON ITS FACE AND AS PREVIOUSLY ADMINISTERED AND APPLIED.

FINDINGS OF FACT

1. La. Rev. Stat. § 17:158(C) now provides:

> If transportation is not provided by the parish or city school board by reason of economically justifiable reasons approved by the State Board of Elementary and Secondary Education in accordance with the provisions of Subsection H of this Section, the Department of Education, in accordance with the provisions of Subsection D hereof, shall reimburse the parent or tutor of any student who resides more than one mile from the school attended by the student to the extent and in the amounts that funds are so appropriated by the

> legislature, but in no event shall such reimbursement exceed one hundred twenty-five dollars per student or three hundred seventy-five dollars for any one family.

La. Rev. Stat. Ann. § 17:158(C) (West Supp. 1994).

2. La. Rev. Stat. § 17:158(D) provides that each parent or tutor applying for reimbursement shall submit a claim in the form of an affidavit, which affirms the accuracy of the claim.

> [The] form shall contain a statement that any person who knowingly or willingly violates the provisions of this Section by filing a false claim or fraudulent claim shall be guilty of a misdemeanor and shall be imprisoned for not more than one (1) year or fined not more than $500 or both, and that the filing of any false claim shall be and constitute a violation of the criminal laws of the state of Louisiana and particularly shall constitute false swearing under the provisions of R.S. 14:125.

La. Rev. Stat. Ann. § 17:158(D) (West 1982).

3. La. Rev. Stat. § 17:158(C) was amended after the trial of this matter. At the time of trial, the statute required the Department of Education to reimburse "the parent or tutor of any student who resides more than one mile from the school attended by the student at the rate of One Hundred Twenty-five and no/100 dollars per student not to exceed Three Hundred Seventy-five and no/100 for any one family." La. Rev. Stat. Ann. § 17:158(C) (West 1982). In 1992, the statute was amended to limit the reimbursement to the amount of funds appropriated by the legislature, if any, but the reimbursement is not to exceed $125.00 per student or $375.00 per family. La. Rev. Stat. Ann. § 17:158(C) (West Supp. 1994).

The Court also finds relevant the fact that La. Rev. Stat. § 17:158(C) was amended in 1992 to allow for a reduction in funding, yet the flat rate reimbursement procedure set forth in the earlier version of the statute was still maintained. There is no longer the requirement that each eligible parent receive $125.00 per child; an eligible parent may now receive a reduced amount depending on the funding by the legislature. It appears to the Court that the legislature contemplates funding the statute in the future with a reduced appropriation. Thus the Court agrees with the plaintiffs that the dispute over reimbursement for transportation expenses is not moot.

6. In *Everson v. Board of Education, 330 U.S. 1, 3, 91 L. Ed. 711, 67 S. Ct. 504 (1947)*, the Supreme Court upheld a state statute reimbursing parents for "money expended by them" in transporting their children to school by bus. In Everson, "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." *Mueller v. Allen, 463 U.S. 388, 398, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983).*

7. The class benefitted by La. Rev. Stat. § 17:158(C) is also all schoolchildren, those attending public as well as parochial schools.

8. The Court finds that the reimbursement of transportation expenses to parents of both public and nonpublic school children, authorized pursuant to La. Rev. Stat. § 17:158(C), is not "an impermissible 'direct subsidy'" of the parochial schools. *Zobrest v. Catalina Foothills School District, 125 L. Ed. 2d 1, U.S. , 113 S. Ct. 2462, 2469 (1993).* The parochial schools are "not relieved of an expense that [they] otherwise would have assumed in educating [their] students." Id. The parents, not the parochial schools, are the direct beneficiaries of the flat rate reimbursement statute. Any

indirect financial benefit that parochial schools may receive "is attributable to 'the private choices of individual parents.'" Id.

9. The Court finds that La. Rev. Stat. § 17:158(C) does not violate the Establishment Clause on its face or as previously administered and applied.

IV. CHAPTER 1

WHETHER THE CAPITAL EXPENSE PROVISION OF CHAPTER 1 OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT OF 1981 IS UNCONSTITUTIONAL ON ITS FACE.

FINDINGS OF FACT

1. The plaintiffs challenge the facial validity of Chapter 1 of the Education Consolidation and Improvement Act of 1981, *20 U.S.C. § 2727*(d), which provides for funding for capital expenditures.

2. The Court has limited plaintiffs' challenge to § 2727(d) to a purely facial challenge. Helms v. Clausen, No. 85-5533 (E.D.La. Feb. 23, 1989) (Chasez, Mag.).

3. The first section of Chapter 1, *20 U.S.C. § 2701* (West 1990), sets forth the policy and purpose of Chapter 1:

> (a) Declaration of policy. In recognition of--
> (1) the special educational needs of children of low-income families and the impact of concentrations of low-income families on the ability of local educational agencies to provide educational programs which meet such needs, and

(2) the special educational needs of children of migrant parents, of Indian children, and of handicapped, neglected, and delinquent children,

the Congress declares it to be the policy of the United States to--

(A) provide financial assistance to State and local educational agencies to meet the special needs of such educationally deprived children at the preschool, elementary, and secondary levels;

(B) expand the program authorized by this division over the next 5 years by increasing funding for this division by at least $500,000,000 over baseline each fiscal year and thereby increasing the percentage of eligible children served in each fiscal year with the intent of serving all eligible children by fiscal year 1993; and

(C) provide such assistance in a way which eliminates unnecessary administrative burden and paperwork and overly prescriptive regulations and provides flexibility to State and local educational agencies in making educational decisions.

(b) Statement of purpose. The purpose of assistance under this chapter [*20 U.S.C.S. §§ 2701* et seq.] is to improve the educational opportunities of educationally deprived children by helping such children succeed in the regular program of the local educational agency, attain grade-level proficiency, and improve achievement in basic and more advanced skills. These purposes shall be accomplished through such means as supplemental education programs, schoolwide programs, and the increased involvement of parents in their children's education.

20 U.S.C. § 2701.

4. Prior to July 1, 1985, public school teachers had provided Chapter 1 services to parochial school students on the premises of the parochial schools.

5. On July 1, 1985, the Supreme Court ruled in *Aguilar v. Felton, 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985),* that New York City's provision of Chapter 1 services, which utilized public school teachers on the premises of parochial schools, violated the Establishment Clause of the federal Constitution.

6. In response to Aguilar v. Felton, Local Educational Agencies (hereinafter "LEAs") began to provide Chapter 1 services to eligible parochial school children at sites off of the premises of the parochial school -- in leased mobile units, public schools or other off-premises real estate.

7. Due to the increased costs of providing off-premises sites, many parochial school children were unable to receive extra help in math and reading courses at neutral sites, as required by the Supreme Court. Congressional Record, Senate; December 1, 1987, at p. S.16818.

8. The Secretary of the United States Department of Education issued a document entitled "Guidance On Aguilar v. Felton," which instructed LEAs to deduct the additional cost of providing Chapter 1 services to private schools from the LEA's total Chapter 1 allocation prior to apportioning funds between public and nonpublic school students.

9. The method proposed by the Secretary, codified in 34 C.F.R. § 200.52(a)(2) (1992), the "off-the-top" provision, was intended to meet the statutory obligation, under *20*

U.S.C. § 2727(a),[10] of providing Chapter 1 services on an equitable basis to both public and nonpublic school children. *Barnes v. Cavazos, 966 F.2d 1056, 1060 (6th Cir. 1992);* see also *54 Fed. Reg. 21,800 (1989)* ("Particularly since Aguilar v. Felton, the administrative costs of providing educational services to private school children have become greater than the costs of providing such services to public school children. If these costs were deducted solely from the portion of the LEA's Chapter 1 funds designated to provide services to private school children, the remaining funds would not be sufficient to provide equitable instructional services to those children, thus defeating the purpose of the statutory provision.")

10. In 1988, Congress enacted § 2727(d), which authorizes funds to pay for the costs of maintaining Chapter 1 services off of the premises of parochial schools at "neutral sites." Under Felton, only parochial schools were required to conduct Chapter 1 services on "neutral sites"; therefore, § 2727(d) applies only to those attending parochial schools. See *Board of Education of the City of Chicago v. Sanders, 1991 U.S. Dist. LEXIS 6708* *23, No. 90-*C-3063, 1991 WL 442781*, at *11 (N.D. Ill. May 15, 1991).

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[10] Section 2727(a) reads in relevant part as follows: "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall, after timely and meaningful consultation with appropriate private school officials, make provisions for including special educational services and arrangements . . . in which such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency. *20 U.S.C. § 2727*(a) (West 1990) (emphasis added).

11. Congress' appropriation for Chapter 1 was $4,327,927,000 in 1988 (Pub. L. No. 100-202, 101 Stat. 1329-275); $4,570,246,000 in 1989 (Pub. L. No. 100-436, 102 Stat. 1701, 1716); $5,425,000,000 in 1990 (H.R. Rep. No. 354, 101st Cong., 1st Sess. 50 (1989)); $6,763,950,000 in 1993 (Pub. L. No. 102-394, 106 Stat. 1792); and $6,924,497,000 in 1994 (Pub. L. No. 103-112; 107 Stat. 1082).[11] Under § 2727(d)(3), Congress authorized the allocation of $30 million in 1988 and $40 million in 1989. Congress later authorized additional funds under § 2727(d)(3): $26 million in 1990 (H.R. Rep. No. 274, 101st Cong. 1st Sess. 90 (1989)); $25 million in 1991 (Pub. L. No. 101-305, 104 Stat. 253); $40 million in 1993 (Pub. L. No. 102-394, 106 Stat. 1792); and $41.5 million in 1994 (Pub. L. No. 103-112, 107 Stat. 1082).[12] Thus, the amounts authorized under § 2727(d) were less than one percent (1%) of the overall Chapter 1 appropriations.[13]

12. Under § 2727(d)(2)(A), the Secretary distributes the appropriated funds to each state according to a statutory formula. Local Educational Agencies (LEAs) apply to the State Educational Agencies (SEAs) to receive the funds, and the SEAs distribute funds to LEAs on the basis of need, according to criteria the SEAs have established. *20 U.S.C. § 2727*(d)(1).

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[11] Figures for Congress' appropriations under Chapter 1 for 1991 and 1992 were not available.

[12] The amount of Congress' appropriation under § 2727(d) for 1992 was not available.

[13] The Court notes that no funds were actually appropriated under § 2727(d) in 1988 and that only $19,760,000 was appropriated in 1989. (Pub. L. No. 100-436, 102 Stat. at 1701, appropriating $20 million for § 2727(d) [referred to as § 1017(d) of Sen. Bill 373], and 102 Stat. at 1716, reducing appropriations by 1.2 percent). However, the actual appropriations are not relevant for the purposes of this facial challenge to the constitutionality of § 2727.

13. Although § 2727(d) does not expressly mention Felton, § 2727(d) refers to the date of the Felton ruling -- July 1, 1985 -- in stating that the money appropriated under that section shall be used for increased capital expenses paid under Chapter 1 after that date.

14. Section 2727(d) funds do not relieve parochial schools of costs previously borne by them. The funds are appropriated for the specific purpose of ensuring that the school districts are able to provide eligible parochial school students with Chapter 1 services comparable to those received by their public school counterparts.

15. Congress enacted *20 U.S.C. § 2727*(d) to help defray the costs of providing such off-premises services. See, Congressional Record - Senate; December 1, 1987 at p. S.16776 ("We have made provision for a new $50 million authorization to alleviate the additional cost of serving private schoolchildren who received Chapter 1 before the Supreme Court's decision.") (emphasis added); See also, S. Rep. No. 222, 100th Cong., 2d Sess., reprinted in U.S. Code & Admin. News 101, 114 ("The Committee has therefore added an additional authorization of $50 million in fiscal year 1989 and 'such sums as may be necessary' through 1993 to assist school districts in complying with the Supreme Court decision. This new authorization is in the form of 'capital expenses' and is to be used solely for the additional cost of delivering services to private school children through alternative means.")

16. Before determining equal Chapter 1 expenditures, an LEA must pay for reasonable and necessary administrative costs of providing services to both public and nonpublic school children, including the type of capital expenditures listed in § 2727(d), from the LEA's whole allocation of funds. 34 C.F.R. § 200.52(a)(2).

17. If Congress did not provide that separate allocation of funds in § 2727(d), the capital expenses described in § 2727(d)(3) would be paid "off-the-top" of the LEA's funds received under Chapter 1.

18. Figures from the late 1980's show that approximately five million students received aid under Chapter 1 every year.[14] Of those five million students, approximately 143,000 attended parochial schools.[15] Given these figures, the Court finds that public school students are the primary beneficiaries of funding under Chapter 1.

19. Therefore, the Court finds that, in terms of numbers, public school children clearly benefit from § 2727(d), which makes it possible for the LEAs to deduct fewer administrative costs "off-the-top" and to therefore allocate more of the Chapter 1 funds to the students.

20. Because § 2727(d) may be applied so that the primary beneficiaries of the provision are public school children, the Court finds that § 2727(d) is constitutional.

CONCLUSIONS OF LAW

1. In *Aguilar v. Felton, 473 U.S. at 414*, the Supreme Court held that it is unconstitutional to provide Chapter 1 services on parochial school grounds.

2. After the Supreme Court's decision in Felton, Congress reauthorized Chapter 1 and included *20 U.S.C. § 2727*(d), which authorized payment of federal funds so that the federal Department of Education could reimburse local school districts for capital expenditures incurred in ensuring that

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[14] Congressional Record -- Senate; December 1, 1987; at p. S.16775.
[15] House Report 100-95; May 15, 1987, at p. 30.

4. Neither the original version of La. Rev. Stat. § 17:158(C) nor the amended version limits the amount to be reimbursed to parents to the actual costs incurred in transporting the student to and from school.

5. Plaintiff contends that the problem with § 17:158(C) is "the fact that the amount of reimbursement here does not depend upon the expenses actually incurred; to the extent that this $125 per child exceeds the actual transportation expenses for a child attending a sectarian school, there would be a positive incentive to send one's children to such a school, violating the Establishment Clause." Note, The Constitutionality of Louisiana Aid to Private Education, *44 La. L. Rev. 865, 867 (1984).*

6. The Louisiana legislature has not appropriated funds since 1985 for the "Transportation Reimbursement Program." Doc. 336, p. 70, Stip. Fact 32.

7. The State of Louisiana has not made any transportation reimbursement payments since 1986. Doc. 336, p. 70, Stip. Fact 33; Doc. 264, P. 89.

8. The statutory requirements for eligibility for reimbursement of transportation costs pursuant to the Transportation Reimbursement Program are identical for the parents of children attending either public or nonpublic schools. La. Rev. Stat. Ann. § 17:158(C), (D) (West Supp. 1994).

9. The Bureau of Transportation of the Louisiana Department of Education administered the Transportation Reimbursement Program when it was funded. Doc. 336, p. 70, Stip. Fact 34.

10. The Bureau of Transportation was eliminated as of July 1, 1988. Ex. S-1; East 1/11/89 Dep. 14.

11. When the Transportation Reimbursement Program was funded and in operation, reimbursement payments were sent by the Bureau of Transportation directly to the parents and no transportation reimbursement funds were sent to any public or nonpublic schools.

CONCLUSIONS OF LAW

1. Plaintiffs must satisfy the threshold requirement of Article III of the Constitution by alleging an actual case or controversy. *City of Los Angeles v. Lyons, 461 U.S. 95, 101, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983).*

2. Plaintiffs "must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70, 78 L. Ed. 2d 58, 104 S. Ct. 373 (1983).*

3. If no resolution of the dispute can redress plaintiffs' injuries, then the dispute is "classically 'moot.'" *Id. at 70-71.*

4. Plaintiffs contend that the dispute over reimbursement for transportation expenses is not moot because there is no guarantee that the legislature will not fund the reimbursement provision of La. Rev. Stat. § 17:158 at some time in the future.

5. Even though the reimbursement provision of La. Rev. Stat. § 17:158 has not been funded since 1985, the Court finds that the issue as to the constitutionality of the statute is not moot. The Court notes the coincidence that 1985, the year that funding for transportation reimbursement ceased, was also the year that this litigation was filed in this Court.

children attending parochial schools are provided with constitutionally permissible off-premises Chapter 1 remedial education services.

3. Section 2727(d) reads as follows:

(d) Capital expenses. (1) A local educational agency may apply to the State educational agency for payments for capital expenses consistent with the provisions of this subsection. State educational agencies shall distribute funds to local educational agencies based on the degree of need as set forth in the application. Such an application shall contain information on such capital expenses by fiscal year and shall contain an assurance that any funds received pursuant to this subsection shall be used solely for purposes of the program authorized by this division.

(2)(A) From the amount appropriated for the purposes of this subsection for any fiscal year, the amount which each State shall be eligible to receive shall be an amount which bears the same ratio to the amount appropriated as the number of children enrolled in private schools who were served under chapter 1 of the Education Consolidation and Improvement Act of 1981 in the State during the period July 1, 1984 through June 30, 1985, bears to the total number of such children served during such period in all States.

(B) Amounts which are not used by a State for the purposes of this subsection shall be reallocated by the Secretary among other States on the basis of need.

(3) There is authorized to be appropriated $30,000,000 for fiscal year 1988, $40,000,000 for the fiscal year 1989, and such sums as may be necessary for each of

the fiscal years 1990, 1991, 1992, and 1993.[16] Any sums appropriated under this provision shall be used for increases in capital expenses paid from funds under chapter 1 of the Education Consolidation and Improvement Act of this section subsequent to July 1, 1985, of local educational agencies in providing the instructional services required under section 557 of the Education Consolidation and Improvement Act and this section, when without such funds, services to private schoolchildren would have been or have been reduced or would be reduced or adversely affected.

(4) For the purposes of this subsection, the term "capital expenses" is limited to expenditures for noninstructional goods and services such as the purchase, lease and renovation of real and personal property (including but not limited to mobile educational units and leasing of neutral sites or space), insurance and maintenance costs, transportation, and other comparable goods and services.

20 U.S.C. § 2727(d).

4. "A facial challenge will succeed only where the plaintiff shows that there is no set of circumstances under which the statute would be constitutional." *Barnes v. Mississippi, 992 F.2d 1335, 1342* (5th Cir.), cert. denied, *126 L. Ed. 2d 419, U.S. , 114 S. Ct. 468 (1993)* (citing *Webster v. Reproductive Health Services, 492 U.S. 490, 524, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989)* (O'Connor, J., concurring) (other citations omitted); see also *Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 797-98, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)* (A court can declare a statute facially invalid if

[16] The Court notes that funding under § 2727(d) has continued for fiscal year 1994. Pub. L. No. 103-112, 107 Stat. 1082.

the statute is unconstitutional in every conceivable application or if the statute seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.).

5. The constitutionality of § 2727(d) cannot be determined by viewing that section in isolation from the context of the whole Act of which it is a part. *Richards v. United States, 369 U.S. 1, 11, 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962); In re Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380, 1384 (5th Cir. 1986).*

6. The Supreme Court has expressly required that public and nonpublic school students receive "comparable" services. *Wheeler v. Barrera, 417 U.S. 402, 421, 41 L. Ed. 2d 159, 94 S. Ct. 2274 (1974);* see also 34 C.F.R. § 200.50 (1992)[17] (requiring participation on an "equitable basis").

7. The Supreme Court has held that the Constitution does not require absolute equality of expenditures between public and parochial schools. *Wheeler, 417 U.S. at 421-22;* see also *Members of Jamestown School Committee v. Schmidt, 699 F.2d 1, 9* (1st Cir.), cert. denied, *464 U.S. 851, 78 L. Ed. 2d 148, 104 S. Ct. 162 (1983)* (Absolute equality of access or expenditure is not required by the Supreme Court's rulings). A statute is not unconstitutional simply because it spends more money on parochial school students than it does on public school students. *Pulido v. Cavazos, 934 F.2d 912, 925 (8th Cir. 1991); Board of Education v. Alexander, 983 F.2d 745, 755 (7th Cir. 1992).*

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[17] 34 C.F.R. § 200.50(a)(1) provides: "An LEA shall provide to educationally deprived children, who reside in a project area of the LEA and who are enrolled in private elementary and secondary schools, special educational services and arrangements as will ensure those children's participation on an equitable basis . . . ." (emphasis added).

8. In *Wheeler, 417 U.S. at 425 n.20,* the Court recognized with approval that Chapter 1 benefits might be delivered to nonpublic school children in "mobile learning centers." In approving the provision of services in separate facilities, the Court indicated that spending additional money to provide services to nonpublic school children was constitutional. Id.

9. In *Mueller v. Allen, 463 U.S. 388, 400-02, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983),* the Supreme Court affirmed the decision of the Eighth Circuit Court of Appeals upholding a state statute that granted parents a tax deduction for amounts spent on their children's tuition, textbooks and transportation despite the fact that the overwhelming majority of the resulting financial benefit went to parents of parochial school students. The Court did not think the disparity was significant because the benefit was available to "all parents" -- whether their children attended public or parochial schools. *Id. at 397.*

10. In Mueller, the Supreme Court declared that it has consistently rejected the argument that "'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Id. at 393* (quoting *Hunt v. McNair, 413 U.S. 734, 742, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973)).*

11. Several federal circuit courts of appeal have addressed the issue of whether allocating "Felton costs" "off-the-top" of total Chapter 1 grant funds is constitutional under the Establishment Clause of the First Amendment. *Pulido, 934 F.2d 912; Barnes, 966 F.2d 1056;* and *Board of Education v. Alexander, 983 F.2d 745.* "Felton costs" are the costs incurred in providing Chapter 1 services outside parochial school buildings in order to comply with the Supreme Court's ruling in *Aguilar v. Felton. Pulido, 934 F.2d at 924; Board of Education v. Alexander, 983 F.2d at 747.*

12. The issue of the constitutionality of allocating "Felton costs" off-the-top is very similar to the issue before this Court, the constitutionality of the federal government appropriating funds under *20 U.S.C. § 2727*(d) "for increases in capital expenses paid from funds under chapter 1 . . . subsequent to July 1, 1985, . . . when without such funds, services to private schoolchildren would have been or have been reduced or would be reduced or adversely affected." *20 U.S.C. § 2727*(d).

13. Consequently, this Court will look to the cases cited above, Pulido, Barnes and Board of Education v. Alexander for guidance.

14. In *Pulido, 934 F.2d at 914*, the Eighth Circuit Court of Appeals addressed several issues, including whether allocating the costs incurred as a result of Felton "off-the-top," rather than allocating those costs from that portion of the Chapter 1 monies that would otherwise be spent for private school students, was constitutional as applied.[18]

15. The Pulido court found that the "off-the-top" allocation of funds for capital expenditures was not mandated in order to increase the number of private school students benefiting from Chapter 1 services. *Id. at 926-27.* Rather, the court found, "both private and public school students benefit from the capital expense provision of *20 U.S.C. § 2727*(d)(3)." *Id. at 927.*

16. The Eighth Circuit relied on the regulations under § 2727(d), particularly 34 C.F.R. § 200.58(a)(1) (1992):

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[18] The Pulido court noted that the facial neutrality of Chapter 1 was unquestioned. *Id. at 926.*

> The regulations provide that a local educational agency ". . . shall use payments received under [the capital expenses provision] . . . to provide Chapter 1 services to benefit, to the extent possible, the public and private school children, who were or are adversely affected by the [local educational agency's] expenditures for capital expenses."

Pulido, 934 F.2d at 927.

17. The Pulido court found that the "Felton costs" were necessary in order to provide private school students with comparable services to those of public school children, as mandated by the Supreme Court in *Wheeler, 417 U.S. at 419. Pulido, 934 F.2d at 927-28.*

18. The Pulido court also held that the allocation of "Felton costs" did not "promote a single religion or religion generally." *Id. at 927-28.*

19. The Eighth Circuit concluded that taking "Felton costs" off the top of a state's Chapter 1 allocation is constitutional. *Id. at 928.*

20. The Sixth Circuit Court of Appeals held the allocation of "Felton costs" to be constitutional. *Barnes, 966 F.2d at 1065-66.*

21. To determine whether the off-the-top allocation was constitutional, the Barnes court asked whether the cost of providing services to parochial school students is "so grossly disproportionate" to the cost of providing comparable services to public school students that the provision of services to the public students is merely a ruse to confer a direct benefit on the sectarian schools. *Id. at 1062* (citing *Members of Jamestown School Committee, 699 F.2d at 9-10.*

22. The Sixth Circuit was faced with an as-applied challenge to the off-the-top allocation of funds, unlike the facial challenge which confronts this Court. The Sixth Circuit's starting point was that "the statute at issue here is facially neutral--Chapter 1 funds are available to educate both public and private school students. The off-the-top allocation method applies to all administrative expenses, not just those associated with educating private school students." Id. at 1064.

23. Applying the "grossly disproportionate test," the Barnes court found the Board's off-the-top allocation of Chapter 1 funds constitutional. *966 F.2d at 1065-66.*

24. In *Board of Education v. Alexander, 983 F.2d at 747,* the Court confronted the issue of whether 34 C.F.R. § 200.52(a)(2), which requires that administrative costs be taken "off-the-top," is constitutional under the Establishment Clause.

25. The Seventh Circuit applied the three-prong test set forth in *Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971),* to decide the constitutionality of the regulation; the court applied only the first two prongs because the plaintiff did not argue on appeal that the regulation violated the third prong, excessive entanglement with religion. *983 F.2d at 753.*

26. Applying the first prong of the Lemon test, the Seventh Circuit held that the regulation has a secular purpose: "to harmonize the mandate of the Supreme Court in Felton and the mandate of the Congress for equal educational opportunity." *983 F.2d at 754.*

23. To decide the second prong of the Lemon test, the Seventh Circuit followed the Supreme Court's analysis in

Hunt v. McNair, 413 U.S. 734, 37 L. Ed. 2d 923, 93 S. Ct. 2868 (1973). First, the court asked whether the government funding pursuant to the regulation flows directly to a sectarian institution. The court found that it does not, but that the funds are handled by the LEA and the Board of Education, which are public institutions. *983 F.2d at 755.*

27. Still following the Hunt court's analysis, the Seventh Circuit sought to determine whether funds were being channeled to a "specifically religious activity in an otherwise substantially secular setting." *983 F.2d at 755.* The court determined that the money was going to the basic education of educationally deprived children, regardless of whether they attended private or public schools. Id.

28. The Seventh Circuit found that the primary effect of the statute and the regulation was not the advancement of any of the sectarian institution's goals. Id.

29. In Board of Education v. Alexander, the Seventh Circuit concluded that the "off-the-top" regulation did not violate the Establishment Clause. *Id. at 757.*

30. In *Everson v. Board of Education, 330 U.S. 1, 3, 91 L. Ed. 711, 67 S. Ct. 504 (1947),* the Supreme Court upheld a New Jersey statute under which a local board of education provided that parents of students attending Catholic schools could be reimbursed for the costs of transporting their children to and from school. The Court stated:

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.

Id. at 17. Similarly, in *Board of Education v. Allen, 392 U.S. 236, 244, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968),* the Supreme Court stated: "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution."

31. Under the Supreme Court's decisions in Everson and Allen, if the government provides a secular benefit to nonpublic school children that has the indirect effect of increasing the number of students attending parochial schools, that indirect effect does not render the government aid unconstitutional.

32. Following the rulings of the Eighth Circuit in Pulido and of the Seventh Circuit in Alexander, this Court will address whether § 2727(d) has a secular purpose and whether the primary effect of § 2727(d) is to advance religion.[19]

33. The Court finds that Chapter 1 serves the valid secular purpose stated in *20 U.S.C. § 2701*(b): to improve the educational opportunities of educationally deprived children. Furthermore, § 2727(d) likewise serves a secular purpose: to ensure that private school students receive educational services comparable to those of their public school counterparts.

34. In accord with Pulido, this Court finds that providing funding for capital expenses for the provision of Chapter 1 services does not impermissibly advance religion: "The program provided to the parochial school students is not

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[19] The plaintiffs do not argue that § 2727(d) fosters the state's entanglement with religion. Consequently, the Court need not address the "entanglement test" that is often applied in Establishment Clause cases.

different from the program provided to public school students and does not accommodate the religious views of the parochial schools." *Pulido, 934 F.2d at 921.* Just as "off-the-top" allocation of resources does not promote religion, neither does an additional, independent allocation of funds promote religion.

35. The Court finds that § 2727(d) is constitutional on its face because it has a secular purpose and does not have the primary effect of furthering religion.

Accordingly,

IT IS THE ORDER OF THE COURT that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; holding that the Louisiana special education statute, La. Rev. Stat. §§ 17:1941-1956, which allows state-paid special education teachers to teach on the premises of pervasively sectarian institutions, is unconstitutional as applied.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Burley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, holding that La. Rev. Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950 are constitutional on their face.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Burley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and

Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, holding that the Louisiana Reimbursement of Required Costs statute, La. Rev. Stat. §§ 17:361-365, is constitutional on its face.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; holding that the Louisiana Reimbursement of Required Costs Statute, La. Rev. Stat. § 17:361-365, is unconstitutional as applied.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish

Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Burley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, holding that the Jefferson Parish School Board's school bus transportation program which results in separate transportation of public and nonpublic school children is constitutional in its application.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Burley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, holding that the Jefferson Parish School Board's school bus transportation program does not result in

excessive entanglement with the exception of the transportation contracts between Westbank Cathedral Academy and the Jefferson Parish School Board and between Faith Lutheran School and the Jefferson Parish School Board.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Burley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, holding that La. Rev. Stat. § 17:158(C), which authorizes reimbursement to parents transporting their children to school, is constitutional on its face and as previously administered and applied.

IT IS THE FURTHER ORDER OF THE COURT that judgment be entered in favor of defendants, Richard W. Riley as Secretary of the United States Department of Education and the United States Department of Education, and against plaintiffs, Mary L. Helms, individually and on behalf of her minor daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, holding that the "capital

expenditures" provision of Chapter 1 of the Elementary and Secondary Education Act of 1965, as amended, *20 U.S.C. § 2727*(d), is constitutional on its face.

Plaintiffs and defendants are requested to submit a proposed judgment in accordance with the Findings of Fact and Conclusions of Law herein.

New Orleans, Louisiana, this 10th day of June, 1994.

FREDERICK J. R. HEEBE

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 85-5533

MARY L. HELMS, individually and as next friend of AMY T. HELMS, a minor; et al.,

Plaintiffs,

v.

WILMER CODY, as Louisiana State Superintendent of Instruction; et al.,

Defendant,

GUY MITCHELL, et al.,

Intervenors.

March 27, 1990, Filed and Entered.

OPINION: ORDER AND REASONS

FREDERICK J. R. HEEBE, United States District Court Judge.

This matter was submitted on the briefs to the Court without oral argument. Currently before the Court are the Motions of the Federal Defendants, the State Defendants, the Intervenors, and the Plaintiffs for Summary Judgment

regarding the Constitutionality of the Chapter 2 education statute, *20 U.S.C. Sections 2701*-3341, and La. Rev. Stat. Sections 17:351-54.

The Court, having fully considered the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that the Motion of the Plaintiffs for Summary Judgment regarding the issue of Chapter 2, *20 U.S.C. Sections 2701*-3341, and La. Rev. Stat. Sections 17:351-54, be, and the same is hereby GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motions of the Federal Defendants, the State Defendants, and the Intervenors for Summary Judgment regarding the issue of Chapter 2, *20 U.S.C. Sections 2701*-3341, and La. Rev. Stat. Sections 17:351-54 be, and the same are hereby DENIED.

REASONS

The primary issue for consideration is whether *20 U.S.C. Sections 2701*-3341 and La. Rev. Stat. Sections 17:351-52 violate the Establishment Clause, facially and/or as applied in Jefferson Parish in Louisiana. The statutes provide for school books, materials, and services which the plaintiffs contend directly aid the nonpublic, religiously affiliated elementary and secondary schools, in violation of the Establishment Clause. Plaintiffs move for summary judgment asking the Court to declare the two statutes unconstitutional. Plaintiffs do not challenge in their current Motion for Summary Judgment the benefits being provided pursuant to these statutes to non-sectarian, non-religiously affiliated, non-discriminatory private schools.

Defendants and Intervenors contend that the statutes are constitutional because 1) the statutes have a secular purpose; 2) the nonpublic schools are not the primary beneficiaries of the aid; 3) the schools receiving the aid are not pervasively sectarian; and 4) the aid neither advances religion nor causes excessive entanglement. The Defendants and Intervenors move for summary judgment, asking the Court to declare the two statutes constitutional.

The statutes, in pertinent part, read as follows:

Section 351:

> A. The State Board of Elementary and Secondary Education shall prescribe and adopt school books and other materials of instruction, which it shall supply without charge to the children of this state at the elementary and secondary levels out of funds appropriated therefor by the legislature in accordance with the requirements of Article VIII, Section 13(A) of the Constitution.
>
> B. The board also shall prescribe and supply schoolbooks and other materials of instruction for use by students attending vocational-technical schools and programs under the jurisdiction of the board.

Section 352:

> A. The State Board of Elementary and Secondary Education, the State Department of Education, or either of these shall take such action as is necessary to assure that all school books, films and booklets related thereto, other similar audio-visual devices, and any other similar materials of instruction are thoroughly screened, reviewed and approved as to their content by the State

> Board of Elementary and Secondary Education and the local parish or city school board concerned.
>
> C. The State Board of Elementary and Secondary Education shall adopt rules and regulations to carry out the provisions of this Section.

La. Rev. Stat. Sections 17:351-52.

Twenty U.S.C. Section 2972(a)(1) provides, inter alia, that:

> a local educational agency [LEA] . . . shall provide for the benefit of such children in such school's secular, neutral, and nonideological services, materials, and equipment, including the participation of the teachers of such children (and other educational personnel serving such children) in training programs, and the repair, minor remodeling, or construction of public facilities as may be necessary . . .

The nonpublic schools in Jefferson Parish have participated primarily in the instructional resources program whereby large quantities of instructional equipment (such as slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes, computers, as well as library books and resource materials) are purchased with Chapter 2 funds and transferred to nonpublic school sites. (See Lewis Exs. 4 and 5).

Nonpublic schools in Jefferson Parish have participated in the past exclusively under the subchapter B provision of the program, *20 U.S.C. Section 2941*(b). (Woodward at 28-29). Under this subchapter, nonpublic schools receive an allotment which allows them to order instructional materials and equipment, including library books. No textbooks are

ordered under Chapter 2 in Jefferson Parish. (Woodward at 128). Besides library books, the equipment ordered by schools includes computers and computer peripherals, computer software, projectors, screens, maps, and globes. (Kropog Exs. 2, 8, 9, and 10; Woodward Ex. 1; Plaintiffs' Motion Exs. 1-6). In Louisiana, the funds allocated to nonpublic schools under Chapter 2 for 1985 totalled $5,064 per school.

ISSUE: WHETHER CHAPTER TWO'S MATERIAL, EQUIPMENT, AND SUPPLIES PROVISIONS AND LA. REV. STAT. SECTIONS 17:351-54 VIOLATE THE ESTABLISHMENT CLAUSE ACCORDING TO THE THREE-PART LEMON TEST.

In *Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1976),* the Court set forth a three part test for determining whether government aid to private schools is constitutional. The three part Lemon test requires that for a state aid program to be constitutional, 1) it must have a secular legislative purpose, 2) it must not have as its primary effect the advancement nor inhibition of religion, and 3) it must not foster excessive entanglement. *403 U.S. 602, 612-13.* In the present case, there is a legitimate secular legislative purpose to the statutes: to improve elementary and secondary education for children attending both public and private schools. *20 U.S.C. Section 3811*(a). Therefore, the aid meets the first part of the Lemon test.

The second prong of the Lemon test provides that the government aid to private education must neither advance nor inhibit religion. The Court has held that the pervasive sectarianism of an institution raises a presumption that any direct aid to that school either advances or inhibits religion. *Bowen v. Kendrick, U.S. , 108 S. Ct. 2562, 2576 (1988)* (Citations omitted). Therefore, an analysis of whether the

institutions in this case are pervasively sectarian will be undertaken.

ISSUE: WHETHER THE PRIMARY BENEFICIARIES OF THE AID ARE PERVASIVELY SECTARIAN.

Several Supreme Court cases provide guidance in making a determination regarding whether the primary beneficiaries of the aid are pervasively sectarian. In *School District of Grand Rapids v. Ball, 473 U.S. 373, 384 (1985),* 40 out of 41 schools participating in the challenged programs were identifiably sectarian. In *Aguilar v. Felton, 473 U.S. 402, 406 (1985),* 84% of Chapter 1 students in nonpublic schools were in Catholic schools, and 8% in Hebrew schools. In *Wolman v. Walter, 433 U.S. 229, 234 (1977),* only 29 out of 720 nonpublic schools were not sectarian, and only 4% of the nonpublic school students attended nonsectarian schools. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. *Id. In Meek v. Pittenger, 421 U.S. 349, 364 (1975),* the Court found the primary beneficiaries of the aid in question to be sectarian schools because they accounted for more than 75% of nonpublic schools.

In *Felton, 473 U.S. at 412,* the Court addressed an argument that the program at issue should be upheld because many of the schools did not have the degree of sectarianism that would trigger Establishment Clause problems. The Court answered by quoting with approval the Second Circuit opinion in Felton:

> "Yet . . . enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in Meek, Meek applies. . . ."

473 U.S. at 412, n. 8.

The Wolman Court relied heavily on the Meek Court's statement that:

> The very purpose of many of those schools is to provide an integrated secular education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman, 403 U.S., at 616-17.* Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.'

Wolman, 433 U.S. at 250 (citations omitted). Further, the Wolman Court stated that: "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." Id. The factors, inter alia, upon which the Court determined that the schools in Wolman were pervasively sectarian are as follows:

> 1. the schools operated under the general supervision of the bishop of their diocese;
>
> 2. most principals were members of a religious order within the Catholic Church;
>
> 3. a little less than one-third of the teachers were members of the Catholic faith;
>
> 4. many of the rooms and hallways in these schools were decorated with a Christian symbol;

5. the state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction;

Id. at 234.

A list of the nonpublic schools participating in the Jefferson Parish Chapter 2 program for 1986-87 (which is not materially different from the current participants) shows 46 participants. Of these, 41 are religiously-affiliated with 34 being Catholic schools. (Woodward Ex. 2; Fine Ex. 3). These religiously-affiliated schools receive 96% of the Chapter 2 funds allocated for nonpublic schools in Jefferson Parish. (Cannon Ex. 18). Additionally, 76% of the nonpublic schools participating in the state program under La. Rev. Stat. Ann. Sections 17:351-52 in Jefferson Parish are religiously-affiliated, and these schools receive 89% of the funds allocated under that program for nonpublic schools. (Cannon Ex. 18).

The Catholic schools, which represent the majority of nonpublic schools participating in the programs, operate under the general supervision and authority of the Archbishop of New Orleans and the parish pastor. (Kropog Vol. I at 202; Cannon Vol. I at 19; Kropog Vol. I at 203; Junkin at 10-11). The schools are located next to the parish church and sometimes the rectory or convent. (Cannon Vol. I at 23-24; Kropog Vol. I at 35-36; Junkin at 16). The schools contain religious symbols in the classrooms. (Junkin at 66).

At least some of the schools exercise a religious preference in accepting students (Cannon Vol. I at 21-22; Cannon Ex. I, p. 3), and in charging tuition. (Cannon Vol. I at 85; Cannon Ex. 5). The official policy of the Archdiocese calls for a religious preference in the hiring of teachers. (Kropog Vol. II at 7-8; Kropog Ex. 18, p. 17). The contracts of principals and teachers in the schools of the Archdiocese contain a

provision allowing termination for lifestyle contrary to the teachings of the Catholic church. (Kropog Vol. II at 13-14; Kropog Ex. 14, Sections A 1230.02, A 2130.06).

The schools require attendance at daily religion classes; some excuse non-Catholics, some do not. (Cannon Vol. I at 30; Kropog Vol. I at 58; Junkin at 56-58). The schools conduct sacramental preparation classes during the school day. (Kropog Vol. I at 165). The schools also require attendance at Mass (Cannon Vol. I at 29; Kropog Vol. I at 37; Junkin at 60). Religious extracurricular activities are also provided. (Kropog Vol. I at 171-72).

The Archdiocese and the individual schools publish statements of philosophy under which the schools operate. (Cannon Exs. 1, 2, 3; Kropog Exs. 11, 12, 14; Junkin Exs. 1, 2-11, 13-15, 16-20, 22-24, 29, 31-33, 35, 37040). These statements indicate the pervasive sectarian nature of the schools and provide that the schools are institutions in which "education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious beliefs is consistently maintained." *Felton, 473 U.S. at 412,* quoting *Meek v. Pittenger, 421 U.S. at 371.*

The St. Anthony School Handbook, for instance, states in its introduction:

> Catholic education is intended to make men's faith become living, conscious and active through the light of instruction. The Catholic school is the unique setting within which this ideal can be realized in the lives of the Catholic children and young people.
>
> Only in such a school can they experience learning and living fully integrated in the light of faith . . . . Here,

> too, instruction in religious truth and values is an integral part of the school program. It is not one more subject along side the rest, but instead it is perceived and functions as the underlying reality in which the student's experiences of learning and living achieve their coherence and their deepest meaning.

(Cannon Ex. 3, p. 2) (see also Jenkins Exs. 8-14, 16-20, 22-24, 29, 31-33, 35, 37-40).

The Handbook of Policies and Regulations for Elementary Schools of the Archdiocese of New Orleans indicates that the operation of the Catholic schools is governed by canon law. (Jenkins Ex. 22, pp. 1-4). The handbook lists the goals and objectives of the Catholic schools. It states: "Broad goals of the Catholic school are to teach the gospel message, to build communities, to be of Christian service and to worship together." (Id. at p. 4).

It lists the major objectives of the Catholic schools as follows:

> To work closely with the home in educating children towards the fullness of Christian life.
>
> To specifically teach Catholic principles and Christian values.
>
> To offer personal experiences in Christian living through liturgy, sacramental life, prayer, guidance, and example. To instruct in human knowledge and skills which enable students to actively participate in the parish community and its society.
>
> To recognize the dignity of the person.

> To encourage teachers to become committed Christians and to develop professional competence.

(Jenkins Ex. 22, p. 5).

As the Plaintiffs state, the handbooks of the parochial schools in Jefferson Parish evidence that the schools under the control of the Archdiocese are pervasively sectarian. The Handbook of Policies and Regulations for Elementary Schools refers to the pastor as "the spiritual and temporal shepherd of the parish" and states that "[h]e is the key person in relation to the parish education program." The pastor has "authority at the parish level" to veto decisions made by the local school board. (Jenkins Exhibit 22 at p. 10).

Under the Archdiocesan policy, "Catholic schools of the Archdiocese are open to all children regardless of race or ethnic background, but emphasis should be given to Catholic children." Additionally, the majority of the schools operated by the Archdiocese located in Jefferson Parish have one or more religious symbols located within the structure itself, including crucifixes, which are in the classrooms because the schools are religious. (Jenkins Dep., p. 106-110).

Mr. Howard Jenkins (Jenkins), the Superintendent of the parochial school system for the Archdiocese of New Orleans, indicated that a majority of the schools operated by the Archdiocese and located in Jefferson Parish require that students attend religion classes, and that the majority of those schools have some type of attendance requirement at exercises such as liturgies and prayer services. (Jenkins at 106-08).

He also indicated that teachers employed at those schools are normally required to accompany their students to Mass. Further, the Plaintiffs illustrate that virtually every handbook

of the Archdiocesan schools reveals the pervasive religious character of the schools. (See, Jenkins Exs. 1-35).

After reviewing each of the 35 exhibits, the Court finds that the schools operated under the auspices of the Archdiocese, the majority of the schools receiving Chapter 2 aid, are pervasively sectarian. Further support for this finding is provided by the Court in *Bowen v. Kendrick, U.S. , 108 S.Ct. 2562, 2574-78 (1988),* where Justice Rehnquist stated that church affiliated elementary and secondary schools are, by their nature, deemed to be pervasively sectarian, while church affiliated colleges and universities are not. Id. 2574-78.

Leaving the analysis of the pervasive sectarianism of the majority of the nonpublic schools, we return to the remainder of the Lemon test.

In *Meek v. Pittenger, 421 U.S. 349 (1975),* the Court struck down a Pennsylvania statute which authorized the loan of instructional materials and equipment to nonpublic elementary and secondary schools. The Court found that the Act had the "primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act." *Meek, 421 U.S. at 363.* The Court found that such aid to sectarian schools was "neither indirect nor incidental." *Id. at 365.* In Meek, "instructional equipment" was defined to include projectors, tape recorders, laboratory equipment, and "any other educational, secular, neutral, nonideological equipment." *Id. at 354, n. 4.* "Instructional material" was defined to include books, periodicals, filmstrips, film, records, tapes, and other similar material. Id.

The Court stated that even though the material and equipment lent was "self-policing, in that starting as secular,

nonideological and neutral, they will not change in use, . . . it would simply ignore reality to attempt to separate the secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then to characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian." *Id. at 365.*

The program in Meek involved just under $12 million dollars of direct aid to predominantly church-related nonpublic schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. *Id. at 365.* Of the 1,320 nonpublic schools in Pennsylvania that qualified for aid under Act 195, more than 75% were church-related or religiously affiliated educational institutions. This amounts to approximately $9,090 per school, and the Meek Court firmly determined that this aid was "neither indirect nor incidental". Id.

Two years later, the Court in *Wolman v. Walter, 433 U.S. 229 (1977),* refused to deviate from the substance of the holding in Meek based upon the formalistic differences in the operation of the Ohio program challenged. The program in Wolman authorized the loan of instructional equipment and materials to the parents of nonpublic school students. The material to be lent was limited to that which was used in public schools and which was "incapable of diversion to religious use." *Wolman, 433 U.S. at 248.*

In Wolman, the instructional materials and equipment included projectors, record players, tape recorders, maps, globes, science kits, and weather forecasting charts. *Id. at 229.* In *Public Funds for Public Schools of N.J. v. Marburger, 358 F.Supp. 29, 34, n.2 (D. N.J. 1973),* aff'd., *417 U.S. 961 (1974),* "instructional materials" included tapes, discs, films, filmstrips, books, periodicals, and maps.

"Supplies" were defined to include, among others, pencils, paper, crayons and paint. Id. Equipment included projectors, televisions, tape recorders, projection screens, and other similar equipment. *Id. at 38.*

Chapter 2 fails the second prong of the Lemon test because due to the pervasive sectarian nature of the schools affected by the aid, the aid "inescapably ha[s] the primary effect of providing a direct and substantial advancement of the sectarian enterprise". *Wolman, 433 U.S. 229, 250.*

Leaving the examination of the second part of the Lemon test, advancement of religion, the third part will be addressed, that of excessive entanglement. In Meek and Wolman, the Courts did not address the issue of monitoring the use of materials and equipment by the nonpublic schools. However, in Marburger, a state program involving loans to nonpublic schools of instructional materials, equipment, and supplies was struck down. The Court expressed concern over the issue of entanglement. The materials had the susceptibility of diversion to religious use. The Court stated that a constant and continuous review and control of the manner in which the items were being used would have to be undertaken. Id. at 36, 40.

The New Jersey statute prohibited the loan of materials for use in sectarian religious courses or devotional exercises. However, the Court found this restriction ineffective in saving the constitutionality of the program because the enforcement of the limitations on the use of the funds would require a continuing and intolerable government presence in the affairs of the church. Id. at 38-39.

One of the key factors which allowed the Court to uphold the textbook loan program was the fact that the textbooks were approved as to their nonsectarian content before they

were lent. *Meek, 421 U.S. at 351-55.* However, there is no such safeguard with respect to the library books lent under the Chapter 2 program.

The Chapter 2 challenge at issue in the current case, as well as the state equipment and materials statute, La. Rev. Stat. Sections 17:351-52, are similar to the statutes found unconstitutional in Meek, Wolman, and Marburger. The aid provided pursuant to the two statutes is unconstitutional according to the cases of Meek, Wolman, and Marburger. First, the primary beneficiaries of the aid are nonpublic schools; second, the majority of the schools receiving the aid are pervasively sectarian; and third, the aid has the impermissible effect of advancing religion. Notably, both the defendants and the plaintiffs moved for summary judgment regarding this issue, stating that no issues of material fact remain regarding the Chapter 2 challenge. Therefore, the Court finds this issue proper for summary judgment at this time. Accordingly,

IT IS THE ORDER OF THE COURT that the Motion of the Plaintiffs for Summary Judgment regarding the issue of Chapter 2, *20 U.S.C. Sections 2701*-3341, and La. Rev. Stat. Sections 17:351-54 be, and the same is hereby, GRANTED.

IT IS THE FURTHER ORDER OF THE COURT that the Motions of the Federal Defendants, the State Defendants, and the Intervenors for Summary Judgment regarding the issue of Chapter 2, *20 U.S.C. Sections 2701*-3341, and La. Rev. Stat. Sections 17:351-54 be, and the same are hereby, DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 85-5533 SECTION "E"

MARY L. HELMS, individually and as next friend of AMY T. HELMS, a minor; et al.,
PLAINTIFFS

v.

CECIL PICARD, as Louisiana State Superintendent of Instruction; et al.,
DEFENDANTS

GUY MITCHELL, et al.,
INTERVENORS

AMENDED JUDGMENT

Considering the record, this Court's ruling on the motions of intervenors and the state defendants to lift the injunction, the Order and Reasons entered this date on all outstanding motions, and the law, the Final Judgment entered by Judge Frederick J.R. Heebe on July 25, 1994 (Doc. No. 374) is hereby AMENDED in the following respects:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana state Treasurer; Louisiana

State Board of Elementary and Secondary Education (BESE); Richard w. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Elton Lagasue as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis and Martin Marino, as members of the Jefferson Parish School Board; and in favor of intervenors, Guy and Jan Mitchell: Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T Helms; Marie Louise Schneider; and Esperanza Tizol; DECLARING that the provision of instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools in Jefferson Parish, Louisiana under chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as re-authorized by Congress; and under La.Rev.Stat. §§ 17:351-52, or as re-authorized by the Louisiana state legislature, is constitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction previously entered against defendants, Cecil J. Picard as the Louisiana Superintendent of Public Instruction; Kenneth Duncan as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary or the United States Department of Education; United States Department of Education; Jefferson

Parish School Board (JPSB); Elton Lagasse as Superintendent of the Jefferson Parish Public School System; Laurie Rolling, as President and member of the Jefferson Parish School Board; Libby Moran, as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Cedric Floyd, Dr. Polly Thomas, Gene Katsanis, and Martin Marino, as members of the Jefferson Parish School Board enjoining them from furnishing instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as re-authorized by Congress, and under La.Rev.Stat. §§ 17:351-52, or as re-authorized by the Louisiana legislature, be and is hereby

LIFTED AND VACATED.

In all other respects, the Judgment remains as entered.

New Orleans, Louisiana, this 28th day of January, 1997.

/s/ Marcel Livaudais,
MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 85-5533 SECTION "B"

MARY L. HELMS, individually and as next friend of AMY T. HELMS, a minor; et al.,
PLAINTIFFS

v.

RAYMOND K. ARVESON, as Louisiana State Superintendent of Instruction; et al.,
DEFENDANTS

GUY MITCHELL, et al.,
INTERVENORS

JUDGMENT

This Court issued its Order and Reasons regarding the constitutionality of Chapter 2. 20 U.S.C. §§ 2911-76, and the Louisiana books and materials program, La.Rev.Stat. §§ 17:351-52, on March 27, 1990 (Doc. 220), which issues were raised by the parties in cross-motions for summary judgment filed pursuant to Fed.R.Civ.P. 56. Thereafter, the remainder of plaintiffs' claims came on for trial before the Court, Honorable Frederick J.R. Heebe presiding, and the Court, having heard the testimony and having considered the record, the evidence, the transcript, the applicable law, and the memoranda submitted by the parties rendered and filed an opinion and made findings of fact and conclusions of law

on June 10, 1994 (Doc. 337). This Court now enters a final judgment as to all of plaintiffs' claims for declaratory and injunctive relief in the above entitled action[1] as follows:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Wary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elemantary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education, Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System, Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, 0.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon V. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, declaring that the provision of instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools in Jefferson Parish, Louisiana under Chapter 2 of the Education Consolidation and Improvement Act of 1901, 20 U.S.C. §§ 2911-76, or as re-authorized by Congress, and under La.Rev.Stat. §§ 17:331-52, or as re-authorized by the Louisiana state legislature, is unconstitutional under the

[1] Dr. Raymond K. Arveson, who succeeded Wilmer Cody as Louisiana Superintendent of Public Instruction, is substituted as a party defendant pursuant to Fed.R.CiV.P. 25(d)(l).

Establishment Clause of the First Amendment to the United States constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana superintendent of Public instruction, Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School system; Martin Marino as president and member of the Jefferson Parish School Board; Polly Thomas as Vice president and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon V. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board, and their successors in office, attorneys, agents, and employees and those acting in concert or with them be, and are hereby PERMANENTLY ENJOINED from furnishing instructional equipment (including computer and audio-visual equipment), educational materials (other than textbooks), library books, and supplies to pervasively sectarian schools under Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2911-76, or as re-authorized by congress, and under La.Rev.Stat. §§ 17:351-52, or as re-authorized by the Louisiana leqislature. Said defendants are further DIRECTED to seek recovery of all such equipment currently on loan to pervasively sectarian located within Jefferson Parish.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter,

Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that the Louisiana special education statute, Le.Rev.Stat. §§ 17:1941-1956, which allows state-paid special education teachers to teach core secular subjects throughout the day in self-contained or resource classrooms on the premises of pervasively sectarian institutions, including Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen, is unconstitutional as administered by the Jefferson Parish Public School System under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board

(JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynm Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Mary T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that La.Rev.Stat. §§ 17:1944, 17:1946, 17:1949, and 17:1950, all relating to special education, are constitutional on their face under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of defendants Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marina as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on benalf of her

daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DISMISSING plaintiffs' claims related to the provision of Special education services on the premises of Chinchuba Institute for the Deaf and Hope Haven/Madonna Manor.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Edlication (BESE) Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and Special Educational Services Corporation, and their successors in office, attorneys, agents, and employees and those acting in active concert or participation with them who receive actual notice of the order by personal service or otherwise be, and are hereby PERMANENTLY ENJOINED from approving, funding, administering, implementing, or in any way providing state-paid special education teachers to teach core subjects in self-contained and resource classrooms throughout the school day on the premises of pervasively sectarian schools, including Immaculate Conception High School, Archbishop Rummell High School, St. Agnes Elementary School, St. Angela Elementary School, St. Benilde Elementary School, St. Christopher Elementary School, St. Francis Xavier Elementary School, and St. Mary Magdalen, as the special education program has been administered by the Jefferson Parish Public School System.

IT IS FURTHER ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School. System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Waite, Barry Bordelan, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish school Board; and the Special Educational Services Corporation, and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that the Louisiana Reimbursement of Required Costs statute, La.Rev.Stat. §§ 17:3601-365, is constitutional on its face under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and

member of the Jefferson Parish School Board; Robert Wolfe, Barry B. Bordelon, 0.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and aqainst intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that the Louisiana Reimbursement of Required Costs Statute, La.Rev.Stat. §§ 17:361-365, is unconstitutional as applied under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment because in the administration of the statute there has not been adequate assurance provided that cash reimbursement to pervasively sectarian schools covers only secular services due to the fact that: (a) the Louisiana Superintendent of Education and the Legislative Auditor have failed to conduct audits of documents and accounts of the nonpublic schools; (b) the Louisiana Superintendent of Education has failed to check claim forms for substantive content on a regular basis; (c) the Louisiana Superintendent of Education has failed to require non-public schools to submit additional reports and documents sufficient to support applications for those reimbursements which exceed stated parameters; and (d) the "Regulations of Louisiana State Board of Elementary and Secondary Education Pursuant to Louisiana Revised Statutes 17:361-17:365" fail to limit reimbursement specifically to state-prepared tests and not teacher-prepared tests.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; and Louisiana State Board of Elementary and Secondary education (BESE); and their successors in office, attorneys, agents, and employees and those acting in concert with them be, and are hereby

PERMANENTLY ENJOINED from approving, funding, or administering the reimbursement program set forth in La.Rev.Stat. §§ 17:361-365, until such time as it has been satisfactorily demonstrated to this Court that the Louisiana Superintendent of Education and the Board of Secondary and Elementary Education (BESE) will properly administer the reimbursement program as prescribed by La.Rev.Stat. §§ 17:361-365, including the conducting of regular audits of documents and accounts of the nonpublic schools by the Superintendent of Public Education and the Legislative Auditor the regular checking of claim forms for substantive content by the Superintendent of Public Education requiring nonpublic schools to submit additional reports and documents sufficient to support applications for all reimbursements which exceed stated parameters; the defining of "parameters" as to appropriate time for such required services in the "Regulations of Louisiana State Board of Elementary and secondary Education Pursuant to Louisiana Revised Statutes 17:361-17:365"; the implementation of an effective procedure to be used to determine whether an expense properly falls within the acceptable parameters; and the establishment of procedures and regulations ensuring that reimbursement is limited to state-prepared tests as distinguished from teacher-prepared tests.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; and Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson

Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board and in favor of intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that the Jefferson Parish School Board's school bus transportation program is Constitutional under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol; and against defendants, Dr Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President end member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer and Michael Hurley as members of the Jefferson Parish School Board; and against intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, DECLARING that direct payments of public transportation funds to pervasively sectarian institutions, including Westbank Cathedral Academy and Faith Lutheran School, for the purpose of transporting their

students violate the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board, and their successors in office, attorneys, agents, and employees and those acting in active concert or participation with them who receive actual notice of the order by personal service or otherwise be, and are hereby PERMANENTLY ENJOINED from providing state transportation funds directly to pervasively sectarian schools, including Westbank Cathedral Academy and Faith Lutheran School.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Dr. Raymond K. Arveson as the Louisiana superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Jefferson Parish School Board (JPSB); Barbara Turner as superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Board; Robert Wolfe, Barry Bordelon, 0.H.

Guidry, Laurie Rolling, Cedric Floyd, Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and in favor of intervenor, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn, Welsch; and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, DECLARING that La.Rev.Stat. § 17:158(C), which authorized reimbursement to parents transporting their children to school, is constitutional on its face and as previously administered and applied under the Establishment Clause of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants, Richard W. Riley as Secretary of the United States Department of Education and the United States Department of Education, and against plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperenza Tizol, DECLARING that the "capital expenditures" provision of Chapter 1 of the Elementary and Secondary Education Act of 1965, as amended, 30 U.S.C. § 2727(d), is constitutional on its face under the Establishment Clause of the First Amendment to the United Status Constitution as made applicable to the states by the Fourteenth Amendment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs, Mary L. Helms, individually and on behalf of her daughter, Amy T. Helms; Marie Louise Schneider; and Esperanza Tizol, may move, within such time as is allowed by applicable law, to recover their costs and attorneys' fees on those claims as to which they are prevailing parties, and that any party adverse to plaintiffs

may oppose any such motion, which motion shall be decided by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants, Dr. Raymond K. Arveson as the Louisiana Superintendent of Public Instruction; Mary Landrieu as Louisiana State Treasurer; Louisiana State Board of Elementary and Secondary Education (BESE); Richard W. Riley as Secretary of the United States Department of Education; United States Department of Education; Jefferson Parish School Board (JPSS); Barbara Turner as Superintendent of the Jefferson Parish Public School System; Martin Marino as President and member of the Jefferson Parish School Board; Polly Thomas as Vice President and member of the Jefferson Parish School Boards, Robert Wolfe, Barry Bordelon, O.H. Guidry, Laurie Rolling, Cedric Floyd; Sharon D. Bitzer, and Michael Hurley as members of the Jefferson Parish School Board; and the Special Educational Services Corporation; and intervenors, Guy and Jan Mitchell; Earline Castillon; and Edward and JacLynn Welsch, may move, within such time as is allowed by applicable law, to recover their costs incurred with respect to those claims as to which they are prevailing parties, and the plaintiffs may oppose any such motion, which motion shall be decided by the Court.

New Orleans, Louisiana, this 25th day of July, 1994.

/s/ Frederick J. R. Heebe
Frederick J.R. Heebe
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-30231

MARY L. HELMS, individually and as next friend of Amy T. Helms; AMY T. HELMS, a minor; MARIE L. SCHNEIDER,
Plaintiffs - Appellants - Cross Appellees - Appellees,

v.

CECIL J. PICARD, Louisiana Superintendent of Public Education; KENNETH DUNCAN, Louisiana State Treasurer; LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; JEFFERSON PARISH SCHOOL BOARD SYSTEM; ELTON LAGASSE, Superintendent of the Jefferson Parish School System; LAURIE E. ROLLING, President and member of the Jefferson Parish School Board; LIBBY MORAN, Vice President and member of the Jefferson Parish School Board; ROBERT WOLFE, member of the Jefferson Parish School Board; BARRY BORDELON, member of the Jefferson Parish School Board; O.H. GUIDRY, member of the Jefferson Parish School Board; CEDRIC FLOYD, member of the Jefferson Parish School Board; POLLY THOMAS, member of the Jefferson Parish School Board; GENE ATSANIS, member of the Jefferson Parish School Board, MARTIN MARINO, member of the Jefferson Parish School Board,

Defendants - Appellees – Cross Appellants, and

RICHARD W. RILEY, Secretary of the United States Department of Education; UNITED STATES DEPARTMENT OF EDUCATION,
Defendants - Appellees, and

SPECIAL EDUCATION SERVICES CORPORATION,
Defendant - Appellant, and

GUY MITCHELL; JAN MITCHELL; EUGENE CERISE; KATHY CERISE,
Intervenor Defendants - Appellees - Cross Appellants.

January 13, 1999, Decided

JUDGES: Before DUHE, BENAVIDES and STEWART, Circuit Judges.[1]

OPINION: ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

PER CURIAM:

The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P and

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[1] Judges Wiener and Dennis did not participate in the consideration of the suggestion for rehearing.

5th Cir. R. 35) the Suggestions for Rehearing En Banc are also DENIED.

For clarity, we amend that part of the last sentence of the panel opinion following the number (2) to read as follows:

> "...(2) we REVERSE the district court's grant of summary judgment in favor of Defendants and RENDER judgment in favor of Plaintiffs declaring that the Federal instructional materials program, *20 U.S.C. §§ 7301-7373*, and its Louisiana counterpart, La.Rev.Stat.Ann. §§ 17:351-52, are unconstitutional as applied in Jefferson Parish, except as applied for the acquisition of textbooks which use is not challenged by this litigation; and (3)...."

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1, states in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

United States Constitution, Amendment 14, Section 1, states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. Rev. Stat. Ann. § 17:1941.

> It is and shall be the duty of state, city and parish public school systems of the state of Louisiana to provide an appropriate, free, publicly supported education to every exceptional child who is a student therein. Out of recognition that included within any population one will find some children who require special education and related services, it is the purpose of this chapter to provide for a flexible and uniform system of special education for all children requiring such programs and related services; to provide a flexible and nondiscriminatory system for identifying and evaluating the individual needs of the child; to determine the appropriateness of the special education program; to

conduct a periodic evaluation of the program and its benefit to the child; to prevent denials of equal educational opportunities on the basis of national origin, sex, economic status, race, religion, and physical or mental handicap or other exceptionalities in the provision of appropriate, free publicly supported education; and to provide such special education programs herein described and related services in the least restrictive alternative education settings.

APPENDIX I

[Excerpt from Stipulated Exhibit S 13]

The IEP* Handbook

*Individualized Education Program

Bulletin 1530, Revised 1989
Louisiana Department of Education

Wilmer S. Cody
State Superintendent

Pages 52-54

NONPUBLIC ENROLLMENT

Voluntarily Enrolled

By definition an exceptional student is considered voluntarily enrolled when all of the following have occurred:

- the public school system in which the student resides has provided the parents with full and effective notice of its obligation and willingness to provide a free, appropriate public education (FAPE);

- the parents have chosen to place the student in a nonpublic school or facility in lieu of services offered by the public system; and

- the student is enrolled in a nonpublic school or facility.

The public school system has the following responsibilities:

- adhere to the 30-calendar-day timeline for developing the initial IEP;
- meet all the requirements of "full and effective" notice in communications with parents;
- maintain on file a copy of the multidisciplinary evaluation;
- maintain documentation of parental refusals of services; and
- ensure that each student has an opportunity to participate equitably in programs and services assisted by or carried out under funds received from P.L. 94-142 (according to the requirements in EDGAR).

NOTE: The public school system is not required to serve voluntarily enrolled students in nonpublic schools. Parents should be informed that in choosing not to accept the available free, appropriate public education, their rights and those of the student to services, due process, and procedural safeguards are limited.

Education Division General Administrative Regulations (EDGAR)

For a voluntarily enrolled student who is selected to participate in the benefits under the EDGAR requirements, the public School system must have on file a current multidisciplinary evaluation. Also services funded under P.L. 94-142 can not be provided without a properly developed IEP. The regular IEP process and content should

be completed with the following in mind:

- Timelines for the development and implementation of IEPs will be determined by the provisions of EDGAR, i.e. IEPs are developed before the provision of those services;

- The parents have the right to receive notice(s) regarding the IEP meeting, to attend the IEP meeting and participate in its development, to give written consent prior to the beginning of services, and to revoke consent at a later date.

- The process, prior to the development of an IEP, will include a review of each student's needs, a ranking of all students' needs according to priorities established, a determination of aggregate costs, a selection of students to be served, and a determination of the services to be provided. The IEP then developed will reflect only those services which will be provided.

- The major content of the IEP must be addressed (i.e., present performance, annual goals, and short-term objectives; evaluation schedules, the special education and related services, if any; and the schedules for services). Areas that do not have to be addressed include references to addressing standards, long-range goals, state assessment test, and least restrictive environment.

- Progress reports must be sent to parents when the services are delivered by a teacher and/or therapist. When the services are indirect in nature (e.g., provision of materials, supplies, or equipment; provision of faculty consultation; inservice

activities; etc.). progress reports are not required.

- The IEP must be reviewed and revised annually for each student who will continue to receive services as determined annually through the EDGAR process. Parents must be notified when services will no longer be provided.

Dual Enrollment

A public school system may opt to provide special educational services to a student who is voluntarily enrolled according to the above definition. Such a student may be dually enrolled (i.e., enrolled by both the nonpublic school or facility and the public school system) with services provided in the following ways:

- the public school system provides a teacher in the nonpublic school to provide special educational services;

- the public school system provides related service personnel to any student(s) receiving special education from a nonpublic school; or

- the public school system provides services for a portion of the day in a public school facility.

The public school system is responsible for developing, reviewing, and revising the IEP to reflect any special education and related services to be provided. Any such services are provided after the public school system has documentation that the parents have declined a free appropriate public education.

Services Provided by Nonpublic Schools

A nonpublic school or facility in which a student is voluntarily enrolled according to the above definition may provide a special education program and related services to qualified students. If a nonpublic school or facility chooses to provide a special education program and seeks to be approved and in compliance, the school must adhere, according to the Joint Commission on Nonpublic School Standards to State standards (e.g. a current multidisciplinary evaluation must be on file; the IEP must be developed prior to placement and reviewed annually; the time, class composition, and pupil-teacher ratio must be appropriate; the teacher(s) must be certified, etc.). The nonpublic school or facility, which may or may not operate in conjunction with the Special Educational Services Corporation (SESC), is responsible for developing, reviewing and revising the IEP to reflect any special education and related services to be provided.

The following guidelines apply to IEP developed through the nonpublic school:

- timelines for the development and implementation of the IEP are determined by appropriate Compliance standards;

- the parents have the right to receive notice(s) about the IEP meeting(s), to attend the IEP meeting(s) and participate in its development, to give written consent prior to the beginning of services and to revoke consent at a later date;

- the IEP is developed on an individual basis;

- an indication should be made on the IEP that the

student is voluntarily enrolled;

- progress reports must be sent to the parents;
- the IEP must be reviewed and revised annually for each student who will continue to receive services; and
- the IEP should indicate that the nonpublic school is responsible.

APPENDIX J

[Excerpt from Stipulated Exhibit S 5]

Regulations for Implementation of the Exceptional Childrens's Act, R.S. 17: 1941 et seq.

Louisiana's Law for Exceptional Students

Bulletin 1706, Revised July, 1993
Louisiana Department of Education
State Superintendent

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SERVICES TO VOLUNTARILY ENROLLED CHILDREN IN APPROVED NONPUBLIC SCHOOLS

§ 460. Exceptional Children in Approved Nonpublic Schools

A. City/parish school systems must operate programs and services assisted or carried out under funds received from the Education of the Handicapped Act (Public Law 94-142) so that handicapped children ages 3 through 21 voluntarily enrolled in approved nonpublic schools have a genuine opportunity to participate equitably in such programs and services consistent with their number and their needs. To meet this requirement school systems must comply with 45 CFR lOOb 651-100b 662 (EDGAR) and 45 CRF 300a 450-451 and the program plan submitted for P.L. 94-l42.

B. City/parish school systems may provide needed

special education and related services to exceptional children in approved nonpublic schools from State and local funds in addition to child identification and evaluation services mandated by §414 as long as such services do not constitute a part of the educational program provided to the exceptional child for which the parents are paying tuition. Such optional services when rendered shall be at no cost to the parent, be provided in accordance with an IEP/Placement document, and meet the standards of the State Board including these Regulations.

C. The special education and related services referred to in §460.A. and B. do not include those for exceptional children who are enrolled in unapproved nonpublic schools. Those children, however, are eligible for child identification and individual evaluation services according to §415.

D. City/parish school systems after a determination that the child who is voluntarily enrolled in a nonpublic school is exceptional in accordance with §414 or §415, must give the parents of such child full and effective notice of the school system's obligation and willingness to provide the child with a free, appropriate public education. (See definitions Part 900)

APPENDIX K

[Stipulated Exhibit S 7]

Business Services
JEFFERSON PARISH PUBLIC SCHOOL SYSTEM
4600 River Road P.O. Box 1130
Marrero, Louisiana 70072
(504) 348-2691

Dr. Russell J. Protti
Superintendent

KNOW ALL MEN BY THESE PRESENT:

This agreement made and entered into this 26th day of August, 1987, by Dr. Russell J. Protti, Superintendent of Education and Barbara C. Adams, Director of Special Education for and On behalf of the Jefferson Parish School Board, and

SPECIAL EDUCATION SERVICES CORPORATION (SESC)

WITNESSETH:

The Jefferson Parish School Board shall hire up to 17 special education teacher 6 teacher assistants in accordance with State regulations which require a current competent authority evaluation (within three years) and an IEP for all children for whom a teacher is allocated. SPECIAL EDUCATION SERVICES CORPORATION has the responsibility of assuring the Jefferson Parish School Board that current evaluations and IEP's are on file and that the pupil/teacher ratio for reimbursement as established by the State shall be

maintained.

SPECIAL EDUCATION SERVICES CORPORORATION and the Jefferson Parish Public School System Special Education Department shall agree upon the pupil/teacher ratio within the minimum/maximum range provided in the State Funding Formula, with the pupil/teacher ratio at the upper limits of the maximum to be given first consideration.

The Jefferson Parish Public School System Special Education Department shall verify the eligibility of students and numbers per program before recommending to the Superintendent the hiring of the teachers. SPECIAL EDUCATION SERVICES CORPORATION agrees to assume full responsibility for any portion of a teacher's or teacher assistant's salary and benefits not reimbursable by the State of Louisiana and/or the United States Federal Government. The cost will be estimated based on last year's data (with appropriate update) with billing for one-half of yearly estimated cost accomplished on or about January 1, 1988, and final billing for reconciled actual cost on or about June 1, 1988 for fiscal year 1987-88.

STAFFING

Location	Type	Number	FY 87/88 Estimated Cost
Rummell	Special Ed Teacher	3	$ 24,342
Chinchuba	Special Ed Teacher	2	16,228
	Special Ed Teacher	2	6,514
Immaculate Conception	Special Ed Teacher	4	32,456
	Special Ed Teacher	2	6,514
St. Agnes	Special Ed Teacher	1	8,114
	Special Ed Teacher	1	3,257
St. Angela	Special Ed Teacher	2	16,228
	Special Ed Teacher	2	3,257
St. Ann	Special Ed Teacher	1	8,114

St. Benilde	Special Ed Teacher	1	8,114
St. Christopher	Special Ed Teacher	1	8,114
St. Francis Xavier	Special Ed Teacher	1	8,114
St. Mary Magdalen	Special Ed Teacher	1	8,114
TOTALS	Special Ed Teacher	17	$137,938
	Special Ed Assistants	6	19,542
TOTAL ALL SCHOOLS			$157,480

Said classroom(s) to be provided by SPECIAL EDUCATION SERVICES CORPORATION at no cost to the Jefferson Parish School Board. The special education program in said class(es) shall be under the general supervision of the Jefferson Parish School Board and the administrator of SPECIAL EDUCATION SERVICES CORPORATION.

The same services rendered to Jefferson Parish Special Education by consultants, visiting teachers, substitutes and other personnel will be available to this program.

It is agreed by SPECIAL EDUCATION SERVICES CORPORATION that said institution' administration shall enforce, apply, and follow all Jefferson Parish School Board personnel policies, including but not limited to, the existing Collective Bargaining Agreement and Teacher Evaluation Program and Teacher Assistant Evaluation Program in the management and supervision of the teachers furnished SPECIAL EDUCATION SERVICES CORPORATION under their contract.

SPECIAL EDUCATION SERVICES CORPORATION acknowledges and understands that the staffing under this contract will be implemented pursuant to the following;

1. Filling of non-public school vacancies will be the

responsibility of the Jefferson Parish Public School System.

2. Positions in special education classes which are provided in non-public schools and are not a duplication of services provided by the Jefferson Parish Public School System shall be filled by sections A, B, C, and D of Article 17.

3. Positions in special education classes Which are provided in non-public schools and are a duplication of services provided by the Jefferson Parish Public School System shall be filled only after all special education positions in the Jefferson Parish Public School System have been filled by certified special education teachers.

4. No teachers shall be voluntarily transferred into non-public positions. (see item 2 above).

5. Only teachers scheduled for Reduction-In-Force shall be involuntarily transferred to Board approved special education teacher vacancies in non-public schools.

6. The Board shall not involuntarily transfer special education teachers assigned to non-public schools prior to the 1983-84 school session unless pupil/teacher ratio changes reduce teacher needs.

7. Teacher evaluation in the non-public schools falls under the auspices of the Jefferson Parish Public School system; therefore, the non-public schools must follow all policies and procedures of the Jefferson Parish Public School System governing teacher evaluation. Specific contractual items deemed

applicable by the agreement between the Jefferson Federation of Teachers and the Jefferson Parish School Board shall prevail.

8. Principals and special education teachers in the non-public schools shall participate in inservice activities, e.g. evaluation and special education and special education policies and procedures.

Failure on the part of SPECIAL EDUCATION SERVICES CORPORATION to follow all applicable policies, procedures, and agreements shall constitute grounds to terminate this contract.

This contract shall expire on the last teaching day of the 1987/88 academic year.

This done and signed on the 26th day of August 1987, in the presence of the undersigned witnesses.

/s/ Russell Protti
Russell J. Protti
Superintendent
Jefferson Parish School Board

/s/ Janice Janz
Administrator
Janice Janz,
Executive Director
Special Educational Services Corp.

/s/ Barbara P. Adams Special Education Department
Jefferson Parish School Board

WITNESSES
/s/ Karen Hayes

Supreme Court, U.S.
FILED
MAY 13 1999
CLERK

No. 98 – 1658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARY L. HELMS, *et al.*,

Petitioners,

v.

CECIL J. PICARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENT SPECIAL EDUCATION SERVICES CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY MARY L. HELMS, ET AL.

Thomas A. Rayer
Counsel of Record
Richard Bordelon
DENECHAUD & DENECHAUD
210 Baronne Street, Suite 1207
New Orleans, Louisiana 70112
(504) 522-4756

Attorneys for Respondent

May 13, 1999

1455

QUESTION PRESENTED

Whether the court of appeals correctly applied *Agostini v. Felton*, 521 U.S. 203 (1997) to the specific facts of this case.

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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BRIEF OF RESPONDENT SPECIAL EDUCATION SERVICES CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of that portion of the judgment in *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), which rejected an as-applied Establishment Clause challenge to a narrow portion of the special education program operated by the Jefferson Parish Public School System ("JPPSS"). In accordance with State law, the JPPSS offers free appropriate special education services to all eligible children who reside within the school district. Petitioners challenge only that portion of the program under which, at the time of trial in 1990, twelve public school employees served as special education teachers in dedicated classrooms located on the premises of eight religiously-affiliated schools in Jefferson Parish.

Respondent Special Education Services Corporation ("SESC") was established as a Louisiana nonprofit corporation in 1981 and was organized for the purpose of "assisting students who are having academic and behavior problems." Appendix to Petition for Writ of Certiorari ("Pet. App.") 117a. For the 1989-1990 school year, the last year prior to trial in this case, the Jefferson Parish School Board contracted with respondent concerning the operation of the special education program as it related to students attending nonpublic schools. Pet. App. 305a. It is the operation of this contract in eight schools in Jefferson Parish in 1990 that is challenged in the petition.

Respondent opposes the petition because it fails to satisfy any of the criteria justifying a grant of the writ. Petitioners do not even attempt to suggest that there is a conflict in the circuits on the issues presented in their petition. *See* Sup. Ct. R. 10(a). Nor do they suggest that the Fifth Circuit engaged in an extraordinary departure from normal judicial procedure. *Id.* It cannot seriously be

contended that the small portion of the unique JPPSS program challenged here – which applies Louisiana special education law to permit the activities of twelve teachers on the premises of eight schools – involves an important federal question of broad applicability. Sup. Ct. R. 10(c). And the suggestion that the Fifth Circuit's holding conflicts with this Court's decisions in *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) and *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994), is frivolous: unlike in those cases, final substantive decision-making authority here rests in all instances with *public* authorities, not religious authorities. *Compare* Pet. App. 305a (teachers are public employees), 308a (teachers are overseen by public school authorities), *infra* p. 9 (public school authorities retain and exercise decision making authority) *with Larkin*, 459 U.S. at 117 (final authority over grant or denial of liquor license application rested with religious organization) *and Grumet*, 512 U.S. at 698 (final authority rested with group expressly selected according to religious criteria).

This is, rather, precisely the kind of petition that is "rarely granted": one involving the alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioners concede that the court of appeals correctly held that this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), supplies the applicable rule of law. *See* Petition for Writ of Certiorari ("Pet.") at 17, 20-21, 29-30. They do not identify any way in which the court of appeals misstated the holding in *Agostini*. Rather, petitioners candidly admit that their complaint is that the decision below improperly "extends *Agostini*" to the marginally different factual situation presented by the small JPPSS on-premises special education program. Pet. at 21.

Petitioners are wrong. The court of appeals carefully and correctly applied *Agostini* in upholding the JPPSS program. Respondent SESC agrees with, and adopts by reference, the analysis in the brief in opposition to certiorari

filed by respondents Guy Mitchell, *et al.*[1] That brief demonstrates that the minor factual differences between the special education program and the on-premises Title I program upheld in *Agostini* are not of constitutional significance and do not dictate an outcome different from that in *Agostini* here.

Respondent SESC submits this separate opposition to address an additional flaw in the petition for certiorari that constitutes additional grounds for denying the writ. Petitioners' purported factual distinctions between *Agostini* and the JPPSS program virtually ignore the detailed findings of fact of the district court, which petitioners have never challenged as clearly erroneous, and upon which the court of appeals properly relied. Instead, petitioners seek to recharacterize the facts by cobbling together carefully selected record excerpts.

Respondent submits this brief opposition to remedy this inaccurate characterization of the JPPSS special education program as operated in 1990. As we explain below, the unchallenged factual findings in this case conclusively demonstrate that the special education program is a religiously neutral benefit program staffed and run by public school employees that provides purely secular educational benefits to students without regard to their religious affiliation. There is no constitutional issue here.

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[1] Respondents also agree with, and hereby adopt by reference, the counterstatement of the case contained in the brief of respondents Guy Mitchell, *et al.*

REASONS FOR DENYING THE WRIT

THE SPECIAL EDUCATION PROGRAM IS RELIGIOUSLY NEUTRAL, IS STAFFED AND RUN BY PUBLIC SCHOOL EMPLOYEES, AND PROVIDES PURELY SECULAR EDUCATIONAL BENEFITS TO STUDENTS WITHOUT REGARD TO THEIR RELIGIOUS AFFILIATION

A. The Program Does Not Define Its Beneficiaries By Reference To Religion.

The on-premises services challenged by petitioners are one small part of the overall JPPSS special education program designed to fulfill the school district's duty to provide "an appropriate, free, publicly supported education to every exceptional child who is a resident [of the district]." La. Rev. Stat. Ann. § 17:1941 (West Supp. 1998). *See also* Pet. App. 6a. State funds for special education programs are allocated to the JPPSS "'based on the number of exceptional children served by employees of the local school board, consistent with state-required pupil/teachers ratios for the provision of services to students with particular exceptionalities.'" Pet. App. 7a quoting *Helms v. Cody*, 856 F. Supp. 1102, 1110 (E.D. La. 1994) (Pet. App. 123a). In 1989-90, the JPPSS employed approximately 740 special education teachers to serve over 5,800 handicapped students. Pretrial Order, Stipulated Fact 35. Only twelve of those teachers were assigned to religiously-affiliated schools. *Id.* at 39.

The portion of the special education program challenged by petitioners involves the last remnants of JPPSS special education services provided on-premises to children enrolled in nonpublic schools. As the district court found, the JPPSS first assigned special education teachers to instruct special education students in nonpublic schools in 1975-76. Pet. App. 118a. The JPPSS provided special

education services on-premises because of "the lack of classroom space in the public school system." Pet. App. 119a. Later, in 1982 the JPPSS determined to limit and ultimately to reduce the services provided to nonpublic school students on the premises of their schools. Pet. App. 119a-121a.

The modifications to the program in effect at the time of trial had reduced and limited services to nonpublic school students in the following respects:

- The JPPSS applied the same teacher-student ratio used in allocating special education teachers for public school students to determine which nonpublic schools had sufficient concentrations of special education students to justify the placement of a special education teacher there. Doc. 254, Adams 4/5/90 Testimony ("Test.") 100, 102, 105, 120; Adams 4/6/90 Test. 26-27.[2] JPPSS special education teachers were assigned only at schools meeting the uniformly applied special education teacher-student ratio. *Id.*

- After the initial assignment, the number of JPPSS special education teachers assigned to teach at nonpublic schools was further reduced by a policy barring the assignment of additional special education teachers to teach students in nonpublic schools. Pet. App. 136a. The number of special education teachers teaching on the premises of nonpublic schools has been reduced by attrition. *Id.*

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[2] Citations to "Doc." refer to the document number on the district court's docket sheet; citations to "Test." refer to trial testimony by the named person at the page and date indicated.

- Although the JPPSS pays a "local portion" of the salary of JPPSS special education teachers working in public schools (who receive the bulk of their salary from State-allocated funds), the JPPSS no longer pays the "local portion" of salaries of teachers working in nonpublic schools. Instead, the "local portion" is paid by tuition surcharges paid by parents of nonpublic school children receiving special education services on-premises. Pet. App. 9a. No public funds are disbursed to any public or private school, or to any religiously-affiliated organization. Pet. App. 142a.

Petitioners' claim that the program has discriminated in favor of Catholic schools, Pet. 18, which they never pursued in the lower courts, is completely unsupported by the record. There is no record evidence that any student at any nonpublic school other than a Catholic school sought and was denied special education services on the premises of his or her school. Moreover, there is no basis for any suggestion that the JPPSS policy discriminates against students on the basis of religion. As the district court found, Catholic schools in Jefferson Parish enroll non-Catholic students. Pet. App. 194a.

B. The Program Provides Purely Secular Special Education Services.

The district court specifically found that the "JPPSS special education teachers at the nonpublic schools do not teach religion." Pet. App. 134a. The court correctly found that the teaching responsibilities of each JPPSS special education teacher, including teachers located on the premises of nonpublic schools, are "described in the Individualized Education Program (IEP)" of each student, which "describes the child's entire special education curriculum." Pet. App. 133a. The district court further found that:

- "Religious instruction is not described in the IEP";
- "No church or religious officials have any authority whatsoever over the content of the IEP"; and
- "Special education teachers must and do teach only what is outlined in the IEP."

Pet. App. 11a, 133a. As the court of appeals properly concluded:

> The record in this case discloses no evidence whatsoever that any of the special education teachers . . . ever attempted to indoctrinate their students . . . . We will not presume that qualified, conscientious state employees are violating the law.

Pet. App. 35a.

Petitioners do not dispute any of these findings, nor is there any basis in the record to do so.

C. The On-Premises Special Education Services Are Provided In Self-Contained Classrooms By Public School Teachers Under The Supervision And Control Of The JPPSS.

Petitioners' insinuation that the JPPSS teachers providing special education services are anything other than public school employees is frivolous. *See* Pet. at 24-25. The courts below found, and it was undisputed, that all the teachers are JPPSS employees "subject to the same collective bargaining agreement" as their colleagues who

teach on the premises of public schools. Pet. App. 9a, 124a. As the court of appeals carefully noted, unlike the teachers in the Community Education program invalidated in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 377 (1985), none of the JPPSS special education teachers is a "part-time public school employee[]," whose primary employment is teaching regular classes within the nonpublic school. Pet. App. 29a-30a.[3] To the contrary, the district court specifically found that the "special education teachers teach throughout the day in self contained or resource classrooms." Pet. App. 135a. *See also* Pet. App. 11a.[4]

Although Petitioners make much of the fact that special education teacher Mary Cerise previously was employed by a religiously-affiliated school, *see* Pet. at 14, it is of no legal significance. Ms. Cerise testified without contradiction that she identifies herself to her students as being employed by the Jefferson Parish Public School System. Pet. App. 138a, 12a. *See also* Pet. App. 136a (district court finding that "parents of the special education students are informed that the special education teachers are employed by the Jefferson Parish School Board at the yearly IEP meeting."). Her situation therefore is precisely analogous to that of some of the Shared Time program teachers in *Ball*, 473 U.S. at 376, whose similar employment history did *not* render that on-premises program unconstitutional. *See Agostini*, 521 U.S. at [2016]

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[3] As the courts below noted, the only other tasks performed by JPPSS teachers on the premises of nonpublic schools are non-teaching custodial duties such as lunch or bus duty and attendance at no more than one one-hour faculty meeting per month. Pet. App. 12a, 134a.

[4] The district court further found that the "special education classrooms within the nonpublic schools are used only for special education instruction." Pet. App. 134a.

(overruling that portion of *Ball* which invalidated the Shared Time program).

Petitioners' "joint employment" argument also rests on a distorted characterization of the supervisory process. Respondent's contract with the JPPSS expressly provides that "teacher evaluation in the nonpublic schools falls under the auspices of the [JPPSS]" and that accordingly the nonpublic schools must follow all policies and procedures of the JPPSS governing teacher evaluation. Pet. App. 12a, 134a-135a. *See also* Doc. 255 Turner 4/6/90 Test. 42, 59, 63, 68. Although the nonpublic school principal participates in the evaluation process by performing a "limited evaluation" of a teacher's teaching abilities and classroom management skills and filling out some forms, the "principal's supervisory role is strictly circumscribed by JPPSS." Pet. App. 12a. "There is no evidence demonstrating that the principals have supervisory authority over the content of the program." *Id.* *See also* Pet. App. 133a. To the contrary, Ms. Cerise testified without contradiction that "everything she does is written down clearly on the IEP and 'sent to an IEP specialist' and thereafter returned to her" with comments by the JPPSS IEP specialist. Pet. App. 138a-139a.

CONCLUSION

For all these reasons and for the reasons set forth in the brief of respondents Guy Mitchell, *et al.*, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARY L. HELMS, *et al.*,

Petitioners,

v.

CECIL J. PICARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF RESPONDENTS GUY MITCHELL, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied *Agostini v. Felton*, 521 U.S. 203 (1997), to the specific facts of this case.

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BRIEF OF RESPONDENTS GUY MITCHELL, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case is an as-applied challenge to the administration of a State special education program in a single county, Jefferson Parish, Louisiana. Petitioners contend that certain aspects of the administration of the program, as it operates in eight nonpublic schools, violate the Establishment Clause. The case was tried several years before this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997). The district court held that the operation of the program was unconstitutional under then-current precedents. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 143a-152a. By the time of the appellate decision, however, this Court had decided *Agostini*, which, as the court below found and all parties agree, presented "a factual situation closely analogous to our own." Pet. App. 18a. The court of appeals carefully considered petitioners' various arguments that features of the Jefferson Parish special education program are unconstitutional under *Agostini*, Pet. App. 5a-42a, but ultimately concluded that the program satisfies constitutional scrutiny under *Agostini*.

Petitioners now ask this Court to review the court of appeals' application of the *Agostini* precedent to the facts of this case. The petition relies heavily on petitioners' characterization of the facts. Because petitioners' characterization is inaccurate in significant respects, and because petitioners' two-sentence summary of the lengthy and careful opinion of the court of appeals is wholly inadequate to illuminate the issues, we set forth an alternative statement of the case in somewhat greater detail than is ordinarily necessary in a brief in opposition.[1]

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[1] Respondents Guy Mitchell, Jan Mitchell, Claire Taylor (Ms. Taylor has recently changed her name, which, in

COUNTERSTATEMENT OF THE CASE

I. THE LOUISIANA SPECIAL EDUCATION PROGRAM

Louisiana law imposes upon public school systems the legal "duty" to provide appropriate special education to "every exceptional child" in the State, including children attending nonpublic schools. La. Rev. Stat. Ann. § 17: 1941 (West Supp. 1998). The category of "exceptional child" is defined by statute to include children with various physical and mental handicaps, as well as gifted and talented children, La. Rev. Stat. Ann. § 17: 1943 (West Supp. 1998), but the program at issue here involves only handicapped children. Eligibility for special education services under this program is determined by public school officials based on statutory criteria. Identical standards of identification, evaluation, and placement are used for public and nonpublic school students. To enable public school districts to fulfill this legal responsibility, State special education funds are allocated among local public school systems on the basis of the number of special education students served by those systems, including students at nonpublic schools. Pet. App. 6a. Public school systems also receive federal money "based on the 'child count' of special education students enrolled at both public and nonpublic schools." Pet. App. 7a. Nonpublic schools themselves have no legal obligation to provide special education services.

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the record below, appears as Claire Friedrichs), Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton are parents of children attending nonpublic religiously affiliated schools in Jefferson Parish, Louisiana and intervened below to defend the constitutionality of the special education program as well as other programs challenged by petitioners below but not the subject of their petition here.

Local school boards have the option of serving nonpublic school students eligible for special education services either on the premises of public schools or at nonpublic schools. The "mainstreaming" philosophy of special education demands placement in the "least restrictive environment," which the State of Louisiana has determined "is in the school which the child would attend if not exceptional." *See* Ex. S-5, § 448.A.5.[2] Administrators of the Jefferson Parish special education program have accordingly determined that it is appropriate to provide special education services on the premises of nonpublic schools. The record contains substantial evidence regarding the secular pedagogical importance of providing special education on the premises of the student's own school. *See, e.g.*, Janz 4/2/90 Test. 153-56.

Special education services are provided on an individual basis to handicapped children. Those services do not substitute for, or displace, regular classroom instruction. Regular classroom instruction continues while special education students withdraw to receive individualized services in a special education classroom, usually on a one-on-one basis.

The special education needs and curriculum of each eligible child are set forth in an Individualized Education Program ("IEP"). The IEP process is wholly secular, and the IEP contains no religious component or instruction. Pet.

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[2] Citations to stipulated exhibits take the form "Ex. S-_"; citations to defendants' exhibits below take the form "Ex. D-_"; citations to stipulations or other portions of the pretrial order take the form "PTO p. __, No. __"; citations to the trial transcript take the form "[Name] [Date] Test. [Page]." All citations are to materials contained in the record below.

App. 11a. Although petitioners now complain that the nonpublic school principal is a participant in the IEP preparation process, *see* Petition for Writ of Certiorari ("Pet.") 4, 8, 25, at trial petitioners expressly did not challenge the IEP development process or the identity of the educators who participate in its preparation. PTO p. 76, No. 12. In addition, there is no evidence that religious issues or instruction have ever played any part in special education services under this program. Indeed, the district court found that: "[r]eligious instruction is not described in the IEP"; "[n]o church or religious officials have any authority whatsoever over the content of the IEP"; and "[s]pecial education teachers must and do teach only what is outlined in the IEP." Pet. App. 11a, 133a. The district court also specifically found that the "special education teachers at nonpublic schools do not teach religion" and that the "special education classrooms are used only for special education instruction." Pet. App. 11a, citing Pet. App. 134a.

The salaries of Jefferson Parish special education teachers assigned to assist nonpublic school students are paid entirely from the general fund of the Jefferson Parish Public School System ("JPPSS"): Jefferson Parish receives payments from the State to defray a portion of these salary expenditures with the remainder of the total cost of the salaries defrayed through a tuition surcharge paid by the parents of the students served. Pet. App. 9a. The annual cost to the State in 1989-90 for its payments relating to the twelve teachers in this program was approximately $149,583. *Id.* No public funds are disbursed to any public or private school, or to any religiously affiliated organization, under the program. Pet. App. 142a.

The program initially used identical criteria in determining whether special education teachers would be located in any given public or nonpublic school, based on whether the number of students with particular needs economically justified employing a special education teacher

at that location under the State pupil-teacher ratio formula. Adams 4/5/90 Test. 100, 102, 105, 120; Adams 4/6/90 Test. 26-27. In the years just before trial in 1990, because of budget cutbacks and program reductions, the nonpublic portion of the program was curtailed in scope. No new special education positions in nonpublic schools were created, and the original positions were reduced by attrition. Pet. App. 136a. A provision in the collective bargaining agreement between the JPPSS and the teachers' union prohibits involuntary teacher transfers except when changes in teacher-pupil ratios reduce the need for teachers at a particular location. Pet. 10a. At all times, teacher placement decisions have been based entirely on secular criteria.

There is no factual basis for petitioners' assertion that the program has discriminated in favor of Catholic schools, Pet. 18, and petitioners never litigated this question in the court below. Nor is there any factual basis for petitioners' claim that eligible children "enrolled in scores of other [non Catholic] nonpublic schools are deprived" of special education services. Pet. i. Indeed, there is no evidence in the record that *any* student enrolled in any non-Catholic school in Jefferson Parish meeting the student-teacher ratio requirement has sought and been denied the services of an on-premises special education teacher.[3]

In 1989-90, the Jefferson Parish program employed approximately 740 special education teachers to serve over 5,800 handicapped students, a ratio of about 7.9 handicapped students for each special education teacher. PTO p. 71 No. 35. Thirty-five of those teachers, serving 290 handicapped

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[3] The Director of Special Education for Jefferson Parish testified that the reason why no special education teachers were located at some non-Catholic private schools was "because there are not enough students to warrant those classes at the schools." Adams 4/5/90 Test. 100.

students (a ratio of 8.3 handicapped students per special education teacher), were located at eleven nonpublic schools. Twenty-three of those thirty-five teachers were located at private *secular* schools. Twelve special education teachers were assigned to serve students at religiously affiliated schools. *Id.* at 39. Teacher assignments were, and are, made without regard to the religious affiliation of the teacher.[4]

To aid in the discharge of its special education duties, the Jefferson Parish public school district has contracted with a number of nonprofit organizations, including United Cerebral Palsy of New Orleans, Greater New Orleans Association of Retarded Citizens, Jefferson Community Action Program Project Head Start, the Human Development Center of the LSU Medical Center, the Magnolia School, the Hope Haven Center, and the Special Education Services Corporation ("SESC"). *See* Exs. D-13 to D-19. SESC, which is also a respondent herein, is an independent, nonprofit organization. The Jefferson Parish special education program has contracted with SESC to administer special education services at the eight Catholic schools in the parish that have special education teachers under the program, as well as at the Chinchuba Institute for the Deaf, a nonreligious private institution. The board of directors of SESC are predominantly representatives of schools served by the program; the sole employee of SESC, a volunteer Executive Director, is also employed by the Office of Special Education for the Archdiocese of New Orleans. She is not a Catholic, and her past experience was in teaching at a Hebrew Day School. Janz 4/2/90 Test. 76, 78, 105, 134. For purposes of its constitutional analysis, the court below

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[4] Petitioners identify no record support, and respondents are aware of none, for their assertion, Pet. 20, that "[f]or the most part, the special education teachers at the Catholic schools were selected originally by its [sic] principals."

accepted petitioners' characterization of SESC as a religiously affiliated organization. Pet. App. 8a.

Special education teachers under the program are full-time employees of the JPPSS whose employment is governed by the JPPSS collective bargaining agreement. They are required to follow the policies and procedures of the public school system, Pet. App. 134a-135a, and their activities are monitored by the State, which conducts random inspections once every two or three years. Pet. App. 10a. The special education teachers perform routine non-pedagogical tasks within the school, such as lunch duty or bus duty, pursuant to the collective bargaining agreement, Pet. App. 134a, and may be required to attend a monthly faculty meeting not to exceed one hour. *Id.*; *see also* Pet. App. 12a. The agreement between the public school system and SESC specifies that "teacher evaluation in the nonpublic schools falls under the auspices of the Jefferson Parish Public School System." *Id.*; *see also* Pet. App. 12a. As part of that process, public school authorities consider evaluations prepared by the principal of the nonpublic school, which assess the special education teacher's "teaching abilities" and "classroom management skills." *Id.* But, contrary to petitioners' claims that "the sectarian principals' supervision and oversight of the teachers is so broad that, under federal employment principles, the sectarian schools play the role of 'joint employers,'" Pet. 24, the record demonstrates, in the words of the court below, that "the principals' supervisory role is strictly circumscribed" and administrative in nature. Pet. App. 12a. There is "no evidence," the court observed, that "the principals have supervisory authority over the content of the special education program." *Id.*

II. PROCEEDINGS BELOW

Petitioners, who sue in their capacity as taxpayers, originally filed this suit in December 1985, challenging a number of different education programs that extended benefits to nonpublic, as well as public, students in Jefferson Parish.[5] They filed a Second Amended Complaint three years later. Based largely on a record compiled in 1989-90, the district court issued judgment in favor of the petitioners. The court concluded that the most pertinent precedents of this Court were *Meek v. Pittenger*, 421 U.S. 349 (1975), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Pet. App. 149a. Quoting from *Meek*, the court concluded that the special education teachers were "performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained," and that, in light of that mission and atmosphere, the "surveillance" that would be necessary to ensure that the special education teachers did not inculcate religion would violate the prohibition on "excessive entanglement." Pet. App. 150a.

The Fifth Circuit reversed. The court began its analysis with an extensive discussion of this Court's intervening precedent, *Agostini v. Felton*, 521 U.S. 203 (1997), which abandoned the presumptions on which the

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[5] Other education programs in Jefferson Parish are the subject of petitions for certiorari filed by different parties. The federal Chapter 2 program is involved in *Mitchell v. Helms*, No. 98-1648 (petition for certiorari filed April 13, 1999), and the State equivalent to Chapter 2 is involved in *Picard v. Helms*, No. 98-1671 (petition for certiorari filed April 13, 1999). Respondents herein are petitioners in No. 98-1648.

district court's conclusion had rested. Pet. App. 18a-27a; *see Agostini*, 521 U.S. at 222-23. The appellate court then noted that this Court had overruled that portion of *Ball* involving the Shared Time program but had not overruled the portion of *Ball* that struck down the Community Education program, and set forth its understanding of the continuing significance of *Ball*. Pet. App. 27a-32a. The court then considered, and rejected, each of petitioners' arguments as to why the Jefferson Parish special education program is unconstitutional under *Agostini* and *Ball*.

Turning first to the issue of government indoctrination (*see Agostini*, 521 U.S. at 223),[6] the court of appeals noted that there is "no evidence whatsoever that any of the special education teachers . . . have ever attempted to indoctrinate their students." Pet. App. 35a. The teachers are "bound by law" to teach only what is included in the student's IEP, and the IEP cannot describe religious instruction. *Id.* "We will not presume that qualified, conscientious state employees are violating the law." *Id.*

The court acknowledged that the "employment status" of these special education teachers "falls somewhere between the Title I instructors in *Agostini* and the Community Education teachers in *Ball*." *Id.* The teachers in this case, unlike those in *Ball*, are "full-time public employees who are not concurrently employed by the parochial schools where they work," and thus "do not suffer from the 'conflict of functions' present in the Community Education teachers in *Ball*." *Id.* On the other hand, the special education teachers here are generally "permanently" assigned to a single school rather than moving from school to school, as in *Agostini*. But, while "admitting that we strike a fine balance," the court of appeals determined that

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[6] It is undisputed that the program has a legitimate secular purpose. *See* Pet. App. 34a.

the absence of the "conflict of functions" present in *Ball* was the more decisive consideration: "The Jefferson Parish teachers are simply not asked to act in the capacity of a 'religious school' teacher during one part of the day, and then to assume the purely secular role of a publicly-financed special education teacher during another." Pet. App. 36a. The court thus held that the public school employee teachers in this case are entitled to the same presumption of compliance with lawful restrictions that was accorded the teachers in *Agostini*. It found no evidence in the record to undercut that presumption. *See* Pet. App. 133a-134a (district court findings that the special education teachers had not, in fact, inculcated religion).

With respect to the fact that the special education teachers are monitored and evaluated by "both public and sectarian entities," the court of appeals noted that the supervision by religious school authorities was largely "administrative" in nature, and that the State "retained sufficient authority over the substantive aspects of the special education instruction" to satisfy the *Agostini* standard. Pet. App. 37a. Similarly, the court found that the "limited 'administrative ties'" of the special education teachers to the religiously affiliated schools, including attendance at faculty meetings and lunch or bus duty, are insufficient to cause a different result. Indeed, the court dubbed it "nonsensical and unsound" to make the constitutionality of such a program "turn on whether state-paid teachers attend faculty meetings or perform lunch duty." Pet. App. 38a, quoting *Agostini*, 521 U.S. at 227-28.

In all other respects, the court of appeals found this case directly analogous to *Agostini*. As in *Agostini*, public funds are "made available generally without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." Pet. App. 38a, quoting *Agostini*, 521 U.S. at 225, quoting *Witters* v. *Washington Dept. of Servs.*

for the Blind, 474 U.S. 481, 487 (1986). This is because funds are awarded on the basis of "the number of exceptional students" in each parish, and eligibility for "exceptional" status "depends on entirely secular statutory criteria." *Id.* Whether benefits flow to public or nonpublic school students is determined entirely by the private choices of the exceptional students and their parents. Pet. App. 39a. For much the same reason, the court concluded that "the criteria by which the special education program selects its beneficiaries" create no "'financial incentive to undertake religious indoctrination.'" Pet. App. 41a, quoting *Agostini*, 521 U.S. at 231. "The Louisiana program does not 'define its recipients with reference to religion' and therefore creates no financial incentive to undertake religious instruction." *Id.*, quoting *Agostini*, 521 U.S. at 235.

Similarly, the court of appeals found that the special education program does not relieve the schools of costs they otherwise would have borne, because "only the State, and not the sectarian schools, has the legal duty to 'provide an appropriate, free, publicly supported education to every exceptional child' residing in Louisiana." Pet. App. 39a, quoting La. Rev. Stat. Ann. § 17:1941 (West Supp. 1982). It rejected the district court's argument, repeated by petitioners here, that the nonpublic schools receive a direct economic benefit "in the form of a student's tuition and the surcharge paid by parents to supplement the special education teachers' salaries." Pet. App. 40a, citing Pet. App. 142a. The surcharge, the court explained, is used exclusively to supplement the salaries of special education teachers,[7] and

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[7] State payments account for only a share of the special education teachers' salaries, and the remainder is accounted for by payments made by the local school district (in the case of teachers assigned to public schools) or by the parents of children attending nonpublic schools (in the case of teachers assigned to nonpublic schools). Pet. App. 9a.

does not benefit the schools at all. Pet. App. 40a-41a. Indeed, the court noted that the schools in fact incur additional costs to educate these children, including the cost of provision of a classroom exclusively dedicated to special education. *Id.*

Finally, the court of appeals concluded that the monitoring in place in the Jefferson Parish program is sufficient to prevent or detect any use of the program for religious indoctrination, and that this level of monitoring does not constitute "excessive entanglement" under *Agostini*. Pet. App. 42a. It therefore reversed the district court and rendered judgement declaring the Louisiana special education program "constitutional as applied in Jefferson Parish." Pet. App. 42a.

REASONS FOR DENYING THE PETITION

This case involves nothing more than application of this Court's recent decision in *Agostini* to a slightly different set of facts. Petitioners suggest no reason why it might satisfy the Court's traditional criteria for certiorari review. They do not deny that the court below applied *Agostini* and *Ball* or that those cases establish the appropriate legal standard. They cite no conflict among the lower courts. They make no attempt to claim that the issues they raise concerning the small, vestigial Jefferson Parish program are widespread or recurring, or that the program itself is typical or representative of other state programs. They do not even claim that this case is of particular legal or practical importance. It involves a modest program, operating in a single Louisiana parish, costing less than $150,000, involving only a handful of teachers, which is being gradually phased out through attrition. Pet. App. 136a.

The latter payments are met by charging special education students a tuition surcharge. Pet. App. 40a-41a.

Petitioners do assert that this case "has the necessary record to draw the appropriate parameters for on-premises sectarian school arrangements." Pet. 30. We respectfully suggest that the request for guidance is premature. *Agostini*, which exhaustively re-examined the issues presented by on-premises supplemental education programs, is barely two years old, and educational authorities throughout the nation are currently assessing and developing programs in compliance with its holding. If important and recurring constitutional issues arise, which cannot be resolved by the lower courts, the time may come for this Court to turn its attention again to special education. But it makes little sense for this Court to review the application of *Agostini* to the details of this program, in the absence of any conflict in the circuits.

Moreover, petitioners' attack on the decision below appears to revolve around differences of fact and degree rather than legal principle. The first question presented is based on an argument never litigated in the court of appeals and wholly unsupported by the record. Other issues involve the relative authority of public and nonpublic school officials over these special education teachers and the quantity and adequacy of their monitoring. There is no real disagreement over legal principles, but only about how the facts of *this case* should be evaluated under established constitutional doctrine. It is hard to imagine a less appropriate candidate for certiorari.

Finally, there is no need for this Court's intervention because the decision below is correct in logic and constitutional principle, and entirely consistent with the central theme of this Court's recent decisions in the area of aid to education. In the past twenty years, with the exception of two cases later overruled in whole or substantial part, this Court has upheld *every* neutral program of assistance to

nonpublic and public education. Just two Terms ago, in *Agostini*, this Court overruled prior decisions predicated on the assumption that any teaching by state-employed teachers within the precincts of religious schools entails too great a risk of religious indoctrination, and that the monitoring and surveillance necessary to prevent such indoctrination would constitute excessive entanglement of government with religion. The Court reasoned that when educational assistance is provided on a wholly neutral basis, without regard to religion, and when programmatic safeguards are sufficient to eliminate serious risk of governmental indoctrination, such programs do not violate the Establishment Clause. That reasoning is equally applicable here.

To be sure, the constitutionality of programs providing neutral aid to students in nonpublic and public schools alike, without discrimination, is a matter of great importance. It is difficult to reconcile decisions from the period 1971-79, which invalidated most forms of aid on the theory that any aid to the educational function of nonpublic schools constitutes impermissible advancement of religion, with more recent precedents upholding neutral programs of assistance. This petition for certiorari, however, targets only a slight variation on a subject recently addressed and resolved by this Court, and review of the decision below is completely unnecessary.

I. PETITIONERS' CLAIM THAT THE PROGRAM DISCRIMINATES IN FAVOR OF CATHOLIC SCHOOLS WAS NOT LITIGATED BELOW AND HAS NO SUPPORT IN THE RECORD.

Petitioners lead with the argument that the Jefferson Parish special education program is unconstitutional because it is not "neutral and nondiscriminatory." Pet. 16. The reason, apparently, is that special education teachers are

provided on the premises of only eight "select" Catholic schools. *Id.* at 16-17. Because the nonpublic component of the special education program is being reduced by attrition and gradually phased out, the school district is not increasing on-site special education services at other nonpublic schools. Pet. App. 136a. From this innocuous fact, petitioners infer that the eight Catholic schools "are thus given a competitive advantage over the other nonpublic schools," Pet. 17 n.7, which makes the program "anything but neutral," Pet. 17, and indeed contravenes the constitutional requirement that "one religious denomination cannot be officially preferred over another." Pet. 18, quoting *Larson v. Valente*, 456 U.S. 228, 234 (1982).

This argument involves no legal issue worthy of this Court's attention. Contrary to petitioners' assertions, the court of appeals explicitly held that the Jefferson Parish program extends aid to handicapped students "without regard to the sectarian-nonsectarian, public-nonpublic nature of the institution benefitted." Pet. App. 38a, quoting *Agostini*, 521 U.S. at 225, quoting *Witters*, 474 U.S. at 487. The court explained that "the Louisiana special education program selects its aid beneficiaries based on neutral, secular criteria: the exceptionality of the child and the number of exceptional students enrolled in Jefferson Parish and in its individual school districts. These are 'neutral, secular criteria that neither favor nor disfavor religion, and [the aid] is [therefore] made available to both religious and secular beneficiaries on a nondiscriminatory basis.'" Pet. App. 41a, quoting *Agostini*, 521 U.S. at 225.

Petitioners say that this factual determination was "erroneous" and that the Fifth Circuit "missed the point." Pet. 16. But even if that were true, it would not justify the use of this Court's resources to correct a mistaken reading of the factual record. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *United States*

v. Johnson, 268 U.S. 220, 227 (1925). Petitioners do not suggest that the *legal standard* applied by the court below was incorrect, or that the decision conflicts with decisions of any other court. Moreover, if the court of appeals failed to appreciate the supposed constitutional significance of the fact that the program now provides on-site services at only eight Catholic schools, that is undoubtedly attributable to the fact that petitioners did not argue in the court of appeals that the Jefferson Parish program is discriminatory or reflects a preference for one religious denomination over another.[8] Having failed to develop the argument in the court below, petitioners should not be permitted to raise it here, without the benefit of the lower courts' views or of factual findings addressing the claim.

In any event, petitioners' charge that the program discriminates in favor of Catholic schools is without support in the record. There is no evidence in the record that students at any nonpublic school otherwise eligible to participate in the program were excluded as a result of pro-Catholic discrimination, and no nonpublic school has raised any such complaint.[9] The only evidence of record bearing

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[8] Combing petitioners' brief in the court of appeals for references even arguably reflecting development of this "discrimination" claim, we can find only a single reference in the summary of argument -- and that reference purports merely to describe the district court's opinion, *see* Reply Brief for Appellants, Responsive Brief for Appellees, and Reply Brief for Cross-Appellees at 13 -- and occasional mention elsewhere of the uncontested fact that the challenged portion of the program operates at eight schools. *Id.* at 20, 29, 34. Petitioners made no further elaboration of the "discrimination" argument in the argument section of their brief and did not develop this argument at trial either.

[9] Petitioners profess to be worried that schools operated by other religious denominations are placed at a

on the "discrimination" issue is the testimony of the Director of Special Education for Jefferson Parish, who explained that the reason why special education teachers were not placed at some non-Catholic private schools was the secular, neutral reason that "there are not enough students to warrant those classes at the schools." Adams 4/5/90 Test. 100.

It is undisputed that eligibility for participation in the program is determined according to a secular criterion ("exceptionality"), and that special education teachers were initially assigned in accordance with student-teacher ratios at particular schools, which is also a secular criterion. In more recent years, the assignment of special education teachers to nonpublic schools has been reduced by attrition (also a secular criterion), in accordance with a provision in the collective bargaining agreement that precludes involuntary transfers (also a secular criterion). There is no evidence that religious affiliation has played the slightest part in these allocation decisions at any time. Indeed, of the 740 special education teachers employed by Jefferson Parish in 1989-90, only thirty-five were assigned to nonpublic schools, and of those, only twelve were assigned to Catholic schools. These facts provide no reasonable basis for an inference of discrimination.

"competitive disadvantage." Pet. 17 n. 7. However, it is doubtful that petitioners, who oppose all forms of aid to nonpublic schools of all religious denominations, and who do not themselves operate or attend a "disadvantaged" school, have standing to defend the interests of non-Catholic nonpublic schools or their students. As taxpayers, they are not injured by the State's failure to extend the program to additional schools. *See Allen v. Wright*, 468 U.S. 757, 751 (1984); *Everson v. Board of Education*, 330 U.S. 1, 4 n.2 (1947); *In re United States Catholic Conference*, 885 F.2d 1020, 1024-26 (2d Cir. 1989).

Petitioners' first question presented is, therefore, quadruply uncertworthy: it reflects a factual, not a legal, disagreement with the court below; it was not raised on a timely basis; it has no support in the record; and it is based on a false factual premise.

II. PETITIONERS' REMAINING CLAIMS PRESENT NO LEGAL ISSUES WARRANTING CERTIORARI.

Petitioners' second question presented is based on the supposed "entanglement" issues in this case, and their third question involves supposed "advancement of religion" issues. Both are predicated on supposed differences between the factual circumstances in this case and those in *Agostini*. Some of those supposed differences are illusory; none is of constitutional dimension; all were thoroughly analyzed by the court of appeals; and none presents a conflict in the circuits or substantial issue of law appropriate for this Court's review.

A. Petitioners' Claim Of Excessive Entanglement

Petitioners assert, Pet. 19, that the Fifth Circuit's entanglement analysis was "relegated . . . to one paragraph only, and is premised on a false concept: If a teacher is 'publicly-paid,' there is no risk that teacher will inculcate religion." But this is a flagrant misrepresentation of the Fifth Circuit's decision. The opinion contains no categorical statement that, if a teacher is publicly-paid, there is no risk that he or she will inculcate religion. Rather, the court stated: "We have not been shown any evidence demonstrating that the monitoring already in place is 'insufficient to prevent or to detect inculcation.'" Pet. App. 42a, quoting *Agostini*, 521 U.S. at 234. In other words, the decision below was based on the *lack of evidence in the record* supporting petitioners' allegations of religious

inculcation -- not on a legal presumption that such a thing could not occur. *See Agostini*, 521 U.S. at 226-27 (Court will not assume, absent evidence of record, that "a full-time public employee . . . will depart from her assigned duties and instructions and embark on religious indoctrination").

The remainder of petitioners' argument in support of certiorari on the second question, Pet. 19-21, consists of supposed factual differences between this case and *Agostini*. The court of appeals addressed these issues in connection with the "governmental indoctrination" question, Pet. App. 35a-39a, and so shall we.

B. Purported Distinctions Between This Case And *Agostini*

As the Fifth Circuit observed, the "factual situation" in this case is "closely analogous" to that in *Agostini*. Pet. App. 18a. As in *Agostini*, full-time public school employees provide entirely secular education services to individual students on the premises of nonpublic schools, on a neutral basis, with institutional safeguards designed to assure that there is no governmental inculcation of religion. Petitioners suggest various grounds for distinguishing *Agostini*. Pet. 22-28. All of these were considered by the court below, and none raises any significant issue of law.

Petitioners' principal arguments are based on supposed differences in the employment status of the special education teachers. Petitioners point out that most of the teachers in this case are permanently assigned to a particular nonpublic school, whereas in *Agostini* "the vast number of the teachers were rotated among the private schools." Pet. 23. Petitioners also argue that nonpublic school officials here have a larger role in evaluating and supervising the special education teachers than was true in *Agostini*. They assert that in this case, unlike *Agostini*, the special education

teachers are "directly accountable to sectarian school principals, and regard them as their immediate supervisors." Pet. 24. Indeed, petitioners claim that the control exercised by the nonpublic school principals is so extensive that the nonpublic schools should be considered "joint employers of the teachers." Pet. 26.[10]

The court below carefully considered petitioners' arguments. The court noted that the "employment status of these special education teachers falls somewhere between the Title I instructors in *Agostini* and the Community Education teachers in *Ball*." Pet. App. 35a. The teachers in the Jefferson Parish program, unlike the teachers in the Community Education program, are full-time employees of the public school district. Accordingly, they "do not suffer from the 'conflict of functions' present in the Community Education teachers in *Ball*." *Id.* On the other hand, as petitioners point out, most of the teachers in the Jefferson Parish program, unlike most of the teachers in *Agostini*, are permanently assigned to perform their duties in a classroom dedicated to secular special education services. Observing that the issue required "fine balance," the court reasoned that

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[10] The legal authorities relied upon by petitioners for this proposition are inapposite. They involve the unrelated questions of when an independent contractor is deemed an employee of a company for purposes of various federal statutes, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), when referrals placed with an employer by a temporary agency may be counted as "employees" for purposes of triggering statutory coverage under Title VII, *Amarnare v. Merrill Lynch*, 611 F. Supp. 344 (S.D.N.Y. 1984) *aff'd*, 770 F.2d 157 (2d Cir. 1985); *Ryals v. Mobile County Sheriff's Dept.*, 839 F. Supp. 25 (S.D. Ala. 1993), and other similarly unrelated legal issues arising in factual circumstances entirely unlike this one. *See* Pet. 24-26.

the full-time character of the special education teachers eliminates the "conflict of functions" that "spelled doom for the Community Education program in *Ball*." *Id.* The court thus upheld the program.

That resolution of the issue is eminently reasonable. If the mere location of services on the premises of a religious school does not negate the presumption that a public school teacher will obey program requirements, *see Agostini*, 521 U.S. at 227-28, then the duration of that assignment should not lead to the opposite result. Indeed, the Court has already suggested as much in *Agostini* and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).[11] In addition, the district court found as a fact that the teachers in the Jefferson Parish program, even though permanently assigned, are not teaching or inculcating religion. Pet. App. 133a-134a. Petitioners do not dispute that finding, but offer the vague response that permanent assignment "helped solidify a sense that the ostensible public employee was actually a part of the private school faculty." Pet. 23. In fact, the court found that the special education teachers are expressly identified as public employees. Pet. App. 136a. In any event, petitioners' suggestion seems a slender basis for requiring line-drawing about how many teachers spend how much time in what kinds of facilities, which would needlessly complicate resolution of the constitutionality of

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[11] In *Agostini*, Title I teachers at 51 out of the 231 participating nonpublic schools were permanently assigned at those schools. *Felton v. Secretary, U.S. Dep't of Educ.*, 739 F.2d 48, 66 (2d Cir. 1984), *aff'd*, *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled sub nom.*, *Agostini v. Felton*, 521 U.S. 203 (1997). In *Zobrest*, the interpreter was to be permanently assigned to the single school at which the beneficiary student was enrolled. 509 U.S. at 7. This demonstrates that there is no per se rule against permanent assignment.

programs of this sort and lead to the very "uncertainty" and "unnecessary litigation" that petitioners claim they wish to forestall. Pet. 30. In the absence of evidence that permanent assignment to a nonpublic school in fact leads to "governmental indoctrination of religion," there is no need to add this variable to the list of issues.

Petitioners' contentions regarding the supervision and evaluation of the special education teachers reveal nothing more than a disagreement with the lower court regarding characterizations of the facts. Arguably, nonpublic school principals and SESC exercise what the court of appeals called "limited supervision" of the teachers. Pet. App. 37a. But the court concluded, based on its review of the record, that this supervision is primarily "related to administrative matters" and that the State "has retained sufficient authority over the substantive aspects of the special education instructions." Pet. App. 37a. That essentially fact-intensive determination is one of degree, not of legal doctrine, and does not present a certworthy issue of law.[12]

Petitioners also argue that the monitoring in this case is insufficient, Pet. 27-28, that the guidelines given to special

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[12] In the Shared Time program in *Ball*, the teachers were supervised by a principal or other teacher at the nonpublic school to which they were assigned. *Americans United for the Separation of Church and State v. School District of Grand Rapids*, 546 F. Supp. 1071, 1099, *aff'd*, 718 F.2d 1389 (6th Cir. 1983), *aff'd*, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled sub nom., Agostini v. Felton*, 521 U.S. 203 (1997). Since *Agostini* overturned the decision holding the Shared Time program unconstitutional, it may be inferred that there is no per se rule against any supervisory relations between nonpublic school officials and the public school teachers assigned to work on the premises of their schools.

education teachers to avoid religious indoctrination are insufficient, Pet. 23, and that teacher assignment policies are different from those in *Agostini*, Pet. 21-22. The court of appeals rejected some of these arguments based on the facts in the record. Pet. App. 42a ("We have not been shown any evidence demonstrating that the monitoring already in place is 'insufficient to prevent or to detect inculcation.'"). Others are based on disputed readings of the record, with no factual findings to clarify them. *Compare* PTO, p. 41-42 (Plaintiffs' Statement of Material Facts) *with id.*, p. 62 (Defendants' and Intervenors' Summary of Material Facts); *see also id.*, p. 105 Nos. 170-71 (Contested Issues of Fact) (disputing whether nonpublic schools exercised control over teacher selection). Frequency of monitoring and the character of formal, written guidelines are matters of administrative detail. In no instance do petitioners identify an issue of law that requires this Court's attention.[13] If any of these issues turn out to be of recurring importance they will arise again, and this Court will be able to review an appropriate case with fuller information about the range of policies and the views of the lower courts.

C. Petitioners' Claims Regarding Economic Benefit To The Nonpublic Schools

Petitioners also claim that the special education program "provides economic benefits to religious education." Pet. 29. On this issue, however, the program is

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[13] Petitioners point to one occasion on which a religious symbol was discovered in a special education classroom. Pet. App. 37a n.12. The item was promptly removed. As the court of appeals observed, the "evidence indicates that program monitors would remove such a symbol if they found it in a classroom." *Id.* This single occurrence, quickly corrected, does not create a substantial question of law.

essentially identical to that upheld in *Agostini*. No cash is provided to nonpublic (or public) schools under the program; funds are used entirely for the salaries and activities of public school teachers who provide special education to eligible children. Any incidental benefit to the schools is attributable to private choices. Moreover, since nonpublic schools have no legal obligation to provide special education services to handicapped students, provision of such services by public school teachers does not relieve the schools of any of their legal obligations. *See* Pet. App. 39a. If remedial educational services did not "impermissibly finance religious indoctrination" in *Agostini*, 521 U.S. at 226, the special education services in this case are similarly permissible.

Petitioners argue, however, that three features of the special education program distinguish this case from *Agostini*. First, they point out that "prior to and subsequent to the installation of this program in 8 Catholic schools, other nonpublic schools had established their own special education programs." Pet. 29. That does not distinguish this case from *Agostini*. There was no suggestion in the opinion for the Court that the religious schools involved in *Agostini* had never provided any remedial education services.[14] *See Agostini*, 521 U.S. at 246-47, 251, 253-57 (Souter, J., dissenting) (pointing out the similarity between Title I services and courses already provided by the religious schools). Similarly, the Shared Time program in *Ball*

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[14] Title I, at issue in *Agostini*, required that the funds be used to "supplement, and to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources" for remedial education services. *Aguilar v. Felton*, 473 U.S. 402, 406 n. 6 (1985), *overruled sub nom., Agostini v. Felton*, 521 U.S. 203 (1997), quoting 20 U.S.C. § 3807(b). There was no requirement that the services had to be of a nature or type that the schools did not otherwise provide.

(approved by this Court in *Agostini*) involved courses "indistinguishable from the other courses offered during the regular religious schoolday." *Ball*, 473 U.S. at 388. These holdings belie petitioners' assumption that the government may never provide services of the same type or nature as those already provided by nonpublic schools. All that is even arguably required by this Court's cases is that the government program produce increased benefits for children, as opposed to merely supplanting private efforts. Petitioners do not argue that the special education program fails to provide benefits to the handicapped children attending nonpublic schools. Indeed, they make the damaging admission that "if the services were not provided at the sectarian schools, the special education students would be compelled to attend public schools." Pet. 15. That is true because the high cost of special education puts it beyond the means of most nonpublic schools.

Second, petitioners argue that special education is distinguishable from remedial education because "special education involves the teaching of core subjects." Pet. 29. That, however, is no more true of special education than it was of remedial education. Both forms of education are designed to assist children with unusual problems in obtaining an adequate education. In both contexts, services are provided either one-on-one or in small groups, while teaching continues uninterrupted in the regular classrooms. These special services are not part of the core curriculum, and are not part of the legally prescribed curriculum that is the responsibility of the nonpublic school to impart.

Third, petitioners suggest that the tuition surcharge paid by participating students to defray part of the cost of special education is somehow a benefit to the school. This suggestion is illogical on its face. The schools and their families would be delighted if the government would resume full payment of salaries and expenses for special education

teachers, and eliminate the need for the surcharge. As the court of appeals noted, there is no discernible "'benefit' flowing to the schools from the surcharge; rather, the surcharge represents an economic burden imposed on the parents of parochial school children who wish to secure special education services for their children." Pet. App. 41a.

Petitioners' contrary argument is based on the testimony of a nonpublic school principal, who stated that the $500 surcharge "helps balance out the budget." Pet. 29, quoting Campbell 4/3/90 Test. 22-23. But in the next breath, the principal admitted that he did "not know why there was a surcharge." *Id.* That one principal was unaware of the purpose of the surcharge does not mean that it is an economic benefit to the schools.

In fact, the failure of the local school board to pay the local share of the special education teachers' salaries has the effect of discriminating *against* handicapped children who attend nonpublic schools. Solely because of their exercise of the constitutionally protected right to attend nonpublic schools, these handicapped children are forced to pay $500 per year for special education services other children receive for free. There is no way to twist that disadvantage into a "benefit" to their schools.

The petition thus presents no legal issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1658

In the Supreme Court of the United States

MARY L. HELMS, ETC., ET AL., PETITIONERS

v.

CECIL J. PICARD, SUPERINTENDENT OF LOUISIANA PUBLIC EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF EDUCATION

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QUESTION PRESENTED

Whether the special-education services program operated by the Jefferson Parish, Louisiana, Public School System, pursuant to La. Rev. Stat. Ann. § 17: 1941 (West 1982 & Supp. 1999), contravenes the Establishment Clause.

In the Supreme Court of the United States

No. 98-1658

MARY L. HELMS, ETC., ET AL., PETITIONERS

v.

CECIL J. PICARD, SUPERINTENDENT OF LOUISIANA PUBLIC EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF EDUCATION

Petitioners challenge, under the Establishment Clause of the First Amendment, the special-education program operated by the Jefferson Parish, Louisiana, Public School System (JPPSS), pursuant to La. Rev. Stat. Ann. § 17:1941 (West 1982 & Supp. 1999). This challenge was raised in a complaint that challenged the application by the JPPSS of several other state and federal education programs, including the program that is now found at Title VI of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 7301-7373. The challenge to Title VI is the subject of two other petitions for a writ of certiorari that are currently pending, see *Mitchell* v. *Helms*, No. 98-1648, and *Picard* v. *Helms*, No. 98-1671 (both filed Apr. 13, 1999).

In their complaint challenging the JPPSS special-education program, petitioners did not make any claim that the federal government was involved in the administration of that program. See Second Amended Complaint ¶¶ 8-30, 69. The district court's order declaring the special-education program unconstitutional and entering judgment in favor of petitioners on that issue did not enter any judgment or award any relief against any federal agency or officer. See Pet. App. 281a-282a, 284a. The federal government also did not brief the constitutionality of the Louisiana special-education program in the district court. After the district court entered a final judgment disposing of all the claims in this case, the state and local defendants and intervenors appealed from the district court's order declaring the special-education program unconstitutional; various other appeals and cross-appeals were also taken from other aspects of the district court's decision. The federal government participated in the court of appeals only as appellee, defending the constitutionality of Title VI, and did not address in its brief the constitutionality of the special-education program.

The court of appeals disposed of all the claims raised by petitioners in a single judgment, rejecting some and sustaining others (the latter are the subject of the certiorari petitions filed in Nos. 98-1648 and 98-1671). The Secretary of Education and Department of Education are therefore respondents to this petition in this

Court under the Court's Rule 12.6. Because we have not previously taken a position on the constitutionality of the Louisiana special-education program, however, we do not take a position in this Court on whether review should be granted on that issue.

Respectfully submitted.

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Solicitor General

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